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No. (1)

Supreme Court, U.S.
FILED
071181 MAR 13 2008
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In The
Supreme Court of the United States

POINT REYES SEASHORE LODGE;
JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN,

Petitioners,

v.

HOLLYNN DELIL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Respondent on January 2, 2003 filed her complaint for violations of the Americans With Disabilities Act of 1990, (*42 U.S.C. § 12101*) in the United States District Court for the Northern District of California and claimed damages pursuant to corresponding state law. The merits of the underlying litigation were resolved by settlement at a mandatory settlement conference held before the U.S. Magistrate. The magistrate informed the district court that a partial settlement had been reached, but Respondent's claim for attorney's fees remained unresolved. The case was thereafter dismissed with prejudice by the district court. (App. 16, DE 37)

Delil v. Point Reyes Seashore Lodge, et al. (App. 1-15) involved (1) whether the Respondent filed her motion for attorney's fees within the deadline established by the local rules of court which are essentially the same as *Rule 54(d)(2)* of the *Federal Rules of Civil Procedure*; and (2) whether the district court after dismissing the action with prejudice retained the jurisdiction to grant Respondent's motion for attorney's fees pursuant to Civil Local Rule 54-6, which is based on the language of *Fed. R. Civ. Proc. 54(d)(2).*

This Petition for Writ of Certiorari is presented to the Court (1) to resolve a conflict between the other Courts of Appeals and the 9th Circuit concerning the applicability of the time limits set out in *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure* to

QUESTIONS PRESENTED FOR REVIEW – Continued

an application for attorney fees and (2) to resolve the interpretation of important federal procedural rules which have not been previously decided by this Court regarding whether a dismissal with prejudice entered in accordance with *Rules 58(a) and 79(a) of the Federal Rules of Civil Procedure* is a "final order" that can only be vacated by the entry of an order of the district court following a motion brought pursuant to *Rules 59(e) or 60(b).*

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties. Point Reyes Seashore Lodge, is a California corporation. Jeffrey F. Harriman and Thomas R. Harriman are the only shareholders and own 100% of the stock. The shares of the corporation are not publicly traded.

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PETITION FOR WRIT OF CERTIORARI

Following a settlement and dismissal of an action, a district court awarded attorney's fees to one of the parties, based upon an application made outside the time periods set out in *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure* and the local rules of the Northern District of California. (App. 4-15) This award was beyond the jurisdiction of the district court. Accordingly, Jeffrey F. Harriman, Thomas R. Harriman, and Point Reyes Seashore Lodge, a California corporation, respectfully petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Ninth Circuit entered on November 16, 2007. (App. 1-3)

This Petition should be granted in order:

(1) to resolve the interpretation of important federal procedural rules which have not been previously decided by this Court regarding:

(a) Whether a dismissal with prejudice entered in accordance with *Rules 58(a) and 79(a) of the Federal Rules of Civil Procedure* is a "final order";

(b) that can only be vacated by the entry of an order of the district court following a motion brought pursuant to *Rules 59(e) or 60(b)*; and,

(2) to resolve a conflict between the other Courts of Appeals and the Ninth Circuit concerning the applicability of the time limits set out in *Rule*

54(d)(2)(B) of the Federal Rules of Civil Procedure to an application for attorney fees.[1]

The memorandum decision of the Ninth Circuit in ***Delil v. Point Reyes Seashore Lodge*** (App. 1-3) affirmed the award of attorney's fees to the Respondent by the district court pursuant to *42 U.S.C. § 12205* and held, *inter alia,* that:

(1) the timely filing by the Respondent of a motion for attorney's fees pursuant to *Rule 54(d)(2)(B) of the Federal Rules of Procedure* or Civil Local Rule 54-6 of the Northern District of California was superfluous, which is in conflict with the holdings of other Circuits in ***Quick v. Peoples Bank of Cullman County***, 993 F.2d 793 (11th Cir. 1993); ***Weyant v. Okst***, 198 F.3d 211 (2d Cir. 1999); ***Allen v. Murph***, 194 F.3d 722 (6th Cir. 1999); ***Tancredi v. Metropolitan Life Ins. Co.***, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003); ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006); ***IPXL Holdings, LLC v. Amazon.Com, Inc.***, 430 F.3d 1377 (Fed. Cir. 2005);

(2) the holding in ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375

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[1] The U.S. District Court for the Northern District of California pursuant to *Fed. R. Civ. Proc. 83* has enacted as a local rule Civil Local Rule 54-6 which corresponds to the procedure set forth in *Fed. R. Civ. Proc. 54(d)(2)* for the application for an award of attorney's fees by the district court.

(1994) was inapplicable to the dismissal with prejudice entered by the district court since it was a conditional dismissal; and,

(3) the district court retained subject matter jurisdiction since the dismissal with prejudice was automatically vacated by the filing of a certificate by the Respondent that all issues had not been settled.

The Court is presented with a decision by the Ninth Circuit which essentially ignored the applicable federal and local procedural rules and sanctioned several questionable procedural applications of the *Federal Rules of Civil Procedure* in reaching the decision, as well as the holding that a timely motion for attorney's fees was superfluous, which is clearly in conflict with the holdings of other Circuits that have addressed the issue.

Consequently, the petitioners respectfully request that the decision of the Ninth Circuit in this matter be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit is dated November 16, 2007 and it is not published in the Federal Reporter, but is published at ***Delil v. Point Reyes Seashore Lodge,*** 2007 U.S. App. Lexis 26991. (App. 1-3) The Order denying the Petition for Rehearing, dated December

14, 2007, is not published. (App. 23) The Order of Judge Susan Illston of the United States District Court for the Northern District of California, dated August 9, 2005, awarding the Respondent statutory attorney's fees (App. 4-15), and the Order entered on March 24, 2004, dismissing the action with prejudice (App. 16) and the August 26, 2004 Order (App. 21-22) are not published.

JURISDICTION

The civil action filed by the Respondent in the District Court for the Northern District of California was pursuant to the Americans With Disabilities Act of 1990, *42 U.S.C. § 12101.* Subject matter jurisdiction of the district court was pursuant to *28 U.S.C. § 1331* and the district court had supplemental jurisdiction over the state law claims pursuant to *28 U.S.C. § 1367.* The appellate jurisdiction of the Court of Appeals for the Ninth Circuit was pursuant to *28 U.S.C. § 1291.* Jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1254(1).*

The memorandum of decision by the Court of Appeals for the Ninth Circuit was filed on November 16, 2007. (App. 1-3) A Petition for Rehearing was timely filed and was denied on December 14, 2007. (App. 23) Pursuant to Supreme Court Rule 13.3, this petition has been filed within 90 days of the denial of the petition for rehearing.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, RULES, AND REGULATIONS INVOLVED

The Respondent was awarded statutory attorney's fees pursuant to *42 U.S.C. § 12205* which provides that: "In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs. . . ."

The following are the excerpts of the relevant *Federal Rules of Civil Procedure*:

Rule 6(b) provides that:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 41(b) provides, *inter alia*, that: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, . . . operates as an adjudication upon the merits."

Rule 54(d)(2) provides, *inter alia*, that:

> (A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.
>
> (B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

Rule 58(a)(1) provides that: "Every judgment and amended judgment must be set forth on a separate document. . . ."

Rule 59(e) provides that: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

Rule 60(b), provides, *inter alia*, that:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . (6) any other reason justifying relief from the operation of the judgment.

Rule 79 provides, *inter alia*, that:

(a) CIVIL DOCKET. The clerk shall keep a book known as "civil docket" . . . , and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, . . . all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court . . . The entry of an order or judgment shall show the date the entry is made. . . .

(b) CIVIL JUDGMENTS AND ORDERS. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the

> approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order . . . and any other order which the court may direct to be kept.

The District Court for the Northern District of California by local rule has established the procedure for applying for an enlargement of time and for the timely filing of a motion for statutory attorney's fees within the Northern District of California pursuant to *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure.*

Civil Local Rule 6(b) for the Northern District of California provides that:

> A Court order is required for any enlargement or shortening of time that alters an event or deadline already fixed by Court order or that involves papers required to be filed or lodged with the Court (other than an initial response to the complaint). A request for a Court order enlarging or shortening time may be made by written stipulation pursuant to Civil L.R. 6-2 or motion pursuant to Civil L.R. 6-3. Any stipulated request or motion which affects a hearing or proceeding on the Court's calendar must be filed no later than 10 days before the scheduled event.

Civil Local Rule 54-6 provides, *inter alia*, that:

> Unless otherwise ordered by the Court after a stipulation to enlarge time under Civil L.R.

> 6-2 or a motion under Civil L.R. 6-3, motions for awards of attorney's fees by the Court must be served and filed within 14 days of entry of judgment by the District Court. Filing an appeal from the judgment does not extend the time for filing a motion. Counsel for the respective parties must meet and confer for the purpose of resolving all disputed issues relating to attorney's fees before making a motion for award of attorney's fees.

The local rule further had a caveat in its "Commentary" following Rule 54-6 which stated as follows:

> A short time period of only 14 days from the entry of judgment for filing a motion for attorney's fees is set by FRCivP 54(d)(2)(B). Counsel who desire to seek an order extending the time to file such a motion, either by stipulation (See Civil L.R. 6-2) or by motion (See Civil L.R. 6-3), are advised to seek such an order as expeditiously as practicable.

STATEMENT OF THE CASE

The Respondent on January 2, 2003 filed her complaint for violations of the Americans With Disabilities Act of 1990, (*42 U.S.C. § 12101 et seq.*) in the United States District Court for the Northern District of California and claimed damages pursuant to corresponding state law. The merits of the underlying litigation were resolved by settlement at a mandatory

settlement conference held before U.S. Magistrate Edward M. Chen on March 12, 2004. The magistrate informed the district court that a partial settlement had been reached, but attorney's fees remained unresolved. (Docket, App. 26, DE 36)

The procedural history following the settlement is a matter of record. The interpretation of and adherence to the *Federal Rules of Civil Procedure* and the Civil Local Rules for the Northern District of California by the district court and the Ninth Circuit Court of Appeals is the focus and thrust of this petition.

The procedural problems commenced immediately following the on-the-record settlement at the mandatory settlement conference when the district court **dismissed the entire action with prejudice on March 24, 2004** but attached a caveat to the dismissal by stating in the order that: " . . . if any party hereto certifies to the court, with proof of service of a copy thereon on opposing counsel, within ninety days hereof, that settlement has not occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings." (App. 16)

Since the Respondent did not request the March 24, 2004, dismissal with prejudice, that dismissal should be considered involuntary; it was pursuant to the provisions of *Fed. R. Civ. Proc. 41(b)*, that is, it was a dismissal which was not specified in *Fed. R.*

Civ. Proc. 41 and the dismissal operated "as an adjudication upon the merits."

Generally a dismissal with prejudice terminates the entire action and is considered a final judgment and appealable when entered. See ***Glick v. Ballentine Produce***, 397 F.2d 590, 593 (8th Cir. 1968); see, e.g., ***Flood v. Harrington***, 532 F.2d 1248, 1250 (9th Cir. 1976). The district court after the dismissal with prejudice pursuant to *Fed. R. Civ. Proc. 41(b)* loses subject matter jurisdiction over the claims asserted in the complaint. See ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994).

Normally, an involuntary dismissal would be considered a judgment on the merits for the Petitioners since no relief was granted to the Respondent. See ***Zenith Ins. Co. v. Breslaw***, 108 F.3d 205, 207 (9th Cir. 1997); ***Schwarz v. Folloder***, 767 F.2d 125, 130 (5th Cir. 1985).

Regardless, following the March 24, 2004 dismissal with prejudice (App. 16), the parties continued to draft the terms of the written settlement agreement which was eventually executed by all parties by May 10, 2004. (App. 18)[2] Consequently, the caveat attached by the district court to the finality of the dismissal with prejudice was fulfilled by May 10,

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[2] A copy of the executed settlement agreement is attached to a subsequent dismissal with prejudice pursuant to *Fed. R. Civ. Proc. 41(a)(1)(ii)* which was entered on July 19, 2004. (App. 17-20)

2004, within the ninety days specified in the order. (App. 16)

However, following the mandatory settlement conference on March 12, 2004, the dispute between the parties concerning the Respondent's claim for statutory attorney's fees continued unabated and was not resolved by the terms of the settlement agreement. Nevertheless, given the obvious ongoing dispute between the parties concerning the Respondent's claim for statutory attorney's fees, the Respondent did nothing procedurally pursuant to the local rules to preserve the issue for resolution by the district court after the dismissal with prejudice.[3] (Docket, App. 24-41)

Civil Local Rule 54-6 required an applicant for an award of attorney's fees by the court to file a motion within 14 days after the entry of judgment, in this case the dismissal with prejudice. (App. 16) Consequently, if the Respondent desired to preserve her right to seek statutory attorney's fees pursuant to *42 U.S.C. § 12205*, Civil Local Rule 54-6 required the Respondent to file her motion for fees at the earliest by April 7, 2004 (14 days from March 24, 2004) or, if the dismissal with prejudice was a valid conditional

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[3] It should be noted that a dismissal with prejudice has been construed by the Fifth Circuit to be tantamount to a judgment on the merits for the purpose of filing a motion for attorney fees pursuant to *Fed. R. Civ. Proc. 54(d)*. ***Schwarz v. Folloder***, 767 F.2d 125, 130 (5th Cir. 1985); cf. ***Zenith Ins. Co. v. Breslaw***, 108 F.3d 205, 207 (9th Cir. 1997).

order, she had to file her motion by July 6, 2004, within 14 days after the order became final on June 22, 2004 (90 days after entry of the dismissal, since the conditions for dismissal were satisfied when the settlement agreement was fully executed on May 10, 2004).

The docket of the district court (App. 24-41) does not reflect that the Respondent filed any motion for attorney's fees with the district court by July 6, 2004, nor does the record reflect that the Respondent ever filed a motion for an enlargement of time to file her motion for attorney's fees as suggested by the commentary to Civil Local Rule 54-6. (Docket, App. 24-41)

The Respondent on June 3, 2004 filed a document stating " . . . that a settlement of all aspects of this lawsuit have (sic) not occurred." (App. 42-43)

The clerk of the court thereafter notified the parties that the case had been reopened and scheduled a case management conference for July 2, 2004. (App. 29, DE 46) **The docket, however, does not reflect the district court vacated the order of March 24, 2004 dismissing the case with prejudice upon receiving the certification of counsel for the Respondent, or at anytime thereafter.** (Docket 24-41)

The parties subsequently prepared a joint case management conference statement which was filed with the district court on June 17, 2004 that stated unequivocally: "The parties have resolved the injunctive relief and damages aspects of the lawsuit by

Settlement Agreement. . . ." (App. 29, DE 49) The case management conference statement further advised the court that the matter of attorney's fees had not been resolved and negotiations regarding the attorney's fee dispute were continuing with recently substituted counsel.[4]

Subsequently, another dismissal with prejudice pursuant to *Fed. R Civ. Proc.* 41(a)(1)(ii), by stipulation, was prepared which incorporated the settlement agreement and provided, *inter alia*, that: "The Court shall retain jurisdiction to interpret and enforce the terms of the 'Mutual Release And Settlement Agreement for Injunctive Relief and Damages Only' incorporated by reference herein and to render a decision on any motion made to the Court for attorney's fees, litigation expenses, and costs." (App. 17-20) The subsequent stipulated order of dismissal was entered on the docket on July 19, 2004. (App. 30, DE 54)[5] The stipulated order for dismissal did not specifically enlarge the time for the Respondent to file her motion for attorney's fees nor did the order address when the Respondent was required to file her motion for fees. (App. 17-20)

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[4] The Updated Joint Case Management Conference Statement dated June 16, 2004 is set forth in full in the Excerpts of Record on Appeal at pages 018-019.

[5] The complete order with the settlement agreement attached is included in the Excerpts of Record on Appeal at Vol. One, pp. 22-46.

After the entry of the July 19, 2004 stipulated dismissal no progress was made toward resolving the attorney fee claim of the Respondent. However, the Respondent on August 18, 2004 did file another certification with the district court which stated that " . . . settlement of the attorney's fees, litigation expenses, and costs aspects of this lawsuit have (sic) not occurred." (App. 31, DE 56) The Respondent again requested that the case be reopened and restored to the calendar.

The district court on August 26, 2004 issued an order which acknowledged that the substantive issues had been dismissed pursuant to the stipulation entered on July 19, 2004 and refused to reopen or restore the case to the calendar so that the issue of attorney's fees could be resolved. The district court did provide, however, in its order that " . . . if the plaintiff seeks to be awarded fees and costs, she may apply for same by a regularly noticed motion, which the court will hear and decide." (App. 21, 31, DE 57) Again, there was no mention in the order of a specific time or any time whatsoever for the Respondent to file the fee motion. (App. 21-22)

Following the issuance of the order of August 26, 2004 the Respondent did not seek any enlargement of time to file her motion for attorney's fees and waited another three (3) months until November 23, 2004 to finally file her motion. (App. 31, DE 58) A total of eight months had elapsed from the time the case was initially dismissed with prejudice (App. 16) until the

Respondent filed her fee motion on November 23, 2004.

The record does not reflect a single attempt by the Respondent to comply with the filing requirements of either *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure* or Civil Local Rule 54-6. (Docket, App. 24-41)

After the Respondent filed her supporting documentation and points and authorities on January 27, 2005 (App. 33, DE 63-68), the Petitioners on February 8, 2005 filed an ex parte application pursuant to Civil Local Rule 6 seeking an enlargement of time for the hearing on the motion for attorney's fees (App. 35, DE 69) In the application, the Petitioners advised the district court there was a potential argument that the Respondent had not complied with Civil Local Rule 54-6. (App. 35, DE 69)

In their opposition to the Respondent's motion for attorney's fees the Petitioners raised as issues the timeliness of the fee motion and the failure of the Respondent to seek any enlargement of time for her motion, and asserted that the Respondent had waived her rights to any statutory attorney's fees or costs by her failure to comply with the applicable procedural rules. (App. 36, DE 73)

The district court after a hearing issued an order on August 9, 2005 awarding the Respondent statutory attorney's fees and costs of $154,975. (App. 4-15)

In the Order the district court stated that the case had been dismissed on March 24, 2004 (App. 5), but nevertheless found that the Respondent was the "prevailing party" since she had obtained a judicially enforceable settlement and was therefore entitled to statutory attorney's fees pursuant to the holding in ***Barrios v. California Interscholastic Federation***, 277 F.3d 1128, 1134 (9th Cir. 2002). (App. 7-9) The Order Awarding Fees (App. 4-15) did not address or indicate that the March 24, 2004 dismissal with prejudice had been vacated, and did not discuss the applicability of Civil Local Rule 54-6. The district court noted the Petitioners' assertion that the Respondent had not complied with the timely filing requirement of *Rule 54(d)(2) of the Federal Rules of Civil Procedure,* then summarily dismissed the issue. (App. 7-9)

The district court's reasoning was as follows:

> Even if Rule 54 applies to the circumstances of this case, the Court finds that plaintiff's motion was timely. The rule provides that the motion for fees must be filed within 14 days of entry of judgment, "unless otherwise provided by statute or order of the court." The Court's Order of July 19, 2004 stated that it would retain jurisdiction over rendering a decision on any fees motion. The Order also stated that the parties should resolve the motion by negotiation if possible.

> Finally, the Court's August 25, 2004 Order[6] stated that the plaintiff could seek fees and costs through "a regularly scheduled motion."
>
> The Court finds that the August 25, 2004 Order provided that the plaintiff was not required to file her motion for attorney's fees and costs within 14 days of the stipulated dismissal, given that the Order was issued more than one month after the dismissal order. (App. 7-8)

The Petitioners timely filed their notice of appeal to the Ninth Circuit Court of Appeals on September 2, 2004. (App. 40, DE 87) On appeal the Petitioners challenged the order awarding the Respondent attorney's fees not only on the ground of the timeliness of the Respondent's motion for fees and costs under all circumstances, but also on the grounds that the district court had lost subject matter jurisdiction as a result of the order dismissing the case with prejudice on March 24, 2004, which did not retain jurisdiction over the enforcement of the settlement agreement (***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994)); thus, the Respondent could not be considered the "prevailing party." ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Resources***, 523 U.S. 598 (2001). Furthermore, the order of March 24, 2004 was

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[6] The Order was signed on August 25, 2004 and filed on August 26, 2005 and is docket entry 57 (App. 17, DE 57) and is attached hereto as Appendix Exhibit 19.

a "final order" since it was never vacated by a subsequent order entered on the docket (*Fed. R. Civ. Proc. 79(a)*, see ***Weldon v. United States***, 196 F.2d 874, 875-876 (9th Cir. 1952); ***Calhoun v. United States***, 674 F.2d 6 (9th Cir. 1981)). Hence, the subsequent stipulated dismissal was void and could not be a basis for an award of attorney's fees.

The Ninth Circuit Court of Appeals in a memorandum opinion, which did not cite any authority to support its conclusions, affirmed the award of attorney's fees and costs to the Respondent, finding that the district court retained subject matter jurisdiction since the Order of March 24, 2004 was conditional. The opinion further held that **the order** of March 24, 2004 was vacated automatically when the Respondent " . . . certified that not all aspects of the lawsuit had settled . . . ," and noted that ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375, (1994) and ***Hagestad v. Tragesser***, 49 F.3d 1430 (9th Cir. 1995) which followed ***Kokkonen*** were not applicable. The rationale set forth in the Memorandum supporting the conclusion that neither case was applicable was that ***Kokkonen*** did not involve a conditional order, and in ***Hagestad*** the conditions for vacating the order had never been met. The final conclusion of the appellate court was essentially that it was a superfluous act for the Respondent to comply with the time requirement of either the local or federal rule and file her motion for fees within 14 days of the second dismissal with prejudice. (App. 1-3)

In essence the Ninth Circuit sanctioned procedures that were not authorized by statute or case law and deviated from the federal and local rules applicable to the proceeding, as well as acts by the district court that were clearly in excess of the subject matter jurisdiction of the district court.

ARGUMENT FOR GRANTING RELIEF

I. The Court should grant the petition to resolve a conflict between the decision in the Ninth Circuit and the interpretation and applications of important federal procedural rules which have not been previously decided by this Court, namely:

A. Whether a dismissal with prejudice entered in accordance with *Rules 58(a) and 79(a) of the Federal Rules of Civil Procedure* is a "final order" and can only be vacated by a separate document (an order) in accordance with the same procedural rules?

The ***Delil*** case (App. 1-15) involved (1) whether the district court after dismissing the action with prejudice retained the power to grant Respondent's motion for attorney's fees pursuant to Civil Local Rule 54-6, which is based on the language of *Fed. R. Civ. Proc. 54(d)(2)*, and (2) whether the Respondent filed her motion for attorney's fees within the deadline established by the local rules of court which are

essentially the same as *Rule 54(d)(2)* of the *Federal Rules of Civil Procedure.*

The district court *sua sponte* ordered the ***Delil*** case dismissed with prejudice. (App. 16) The order was entered on the docket on March 24, 2004 following the settlement of all substantive ADA issues at a mandatory settlement conference on March 12, 2004 before the U.S. magistrate. (App. 26, DE 37) The above procedure complied with *Rules 58(a)* and *79(a) of the Federal Rules of Civil Procedure.*

The district court was informed by the magistrate that only the collateral issue of the Respondent's claim for statutory attorney's fees remained unresolved. (App. 26, DE 36) ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196 (1988), [statutory attorney's fees are a collateral issue]. The district court in the order of dismissal did not specifically retain jurisdiction over the settlement agreement or incorporate the settlement agreement. (App. 16) See ***Kokkonen v. Guardian Life Ins. Co. of America,*** 511 U.S. 375 (1994). The order of dismissal did have a caveat that it would be vacated should a party certify to the court within 90 days that settlement had not occurred. There was no mention, however, of the necessity to resolve the Respondent's claim for statutory attorney's fees within 90 days. (App. 16)

The Petitioners contend that the order dismissing the entire action on March 24, 2004 (App. 16) was a final order that terminated the litigation.

The courts of appeals that have addressed the issue have consistently held that a dismissal with prejudice is final and appealable when entered and divests the district court of its jurisdiction to affect the substantive rights of the parties. The district court after the dismissal, however, does retain jurisdiction to rule upon collateral matters.

The Eighth Circuit held in the case of ***Glick v. Ballentine Produce, Inc.***, 397 F.2d 590, 593 (8th Cir. 1968) which involved a dismissal with prejudice pursuant to *Fed. R. Civ. Proc. 41(b)* where the pleadings failed to state a cause of action that: "A dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and bars further action between the parties." See also, ***Schwarz v. Folloder***, 767 F.2d 125, 130 (5th Cir. 1985). Moreover, the court of appeals in ***Flood v. Harrington***, 532 F.2d 1248, 1250 (9th Cir. 1976) held that where the complaint and action are dismissed with prejudice, the order is final and appealable under *28 U.S.C. § 1291*; and, in ***Krull v. Celotex***, 827 F.2d 80, 82 (7th Cir. 1987) the appellate court held that the dismissal with prejudice divested the district court of jurisdiction, except for collateral matters. See, e.g., ***Hatfield v. Board of County Commrs. For Converse County***, 52 F.3d 858 (10th Cir. 1995) [motion to alter or amend judgment pursuant to *Rule 59(e)*; accord, ***Lichtenberg v. Besicorp, Inc.***, 204 F.3d 397 (2d Cir. 2000); ***Hamid v. Price-Waterhouse***, 51 F.3d 1411, 1415 (9th Cir.

1995) [motion to vacate a dismissal is a *Rule 59(e)* motion].[7]

The fact that a collateral issue regarding attorney's fees remains unresolved has no impact upon the finality of a dismissal of the action with prejudice. ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196, 199-200 (1988).

The dismissal with prejudice in ***Delil*** was not ambiguous. The order stated unequivocally that: "IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE." (App. 16) The order, therefore, complied with the separate document requirements of *Fed. R. Civ. Proc. 58(a)* and thus was a "final order" when entered on the docket pursuant to *Fed. R. Civ. Proc. 79(a)*. See, e.g., ***Weldon v. United States***, 196 F.2d 874, 875-876 (9th Cir. 1952); ***Calhoun v. United States***, 647 F.2d 6 (9th Cir. 1981); cf. ***Bailey v. Potter***, 478 F.3d 409, 412 (D.C. Cir. 2007) [which held that when a dismissal in conformity with *Fed. R. Civ. Proc. 58(a)* has not been entered on the docket as required by *Fed. R. Civ. Proc. 79(a)* the district court retains subject matter jurisdiction].

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[7] A regional treatise interpreting the applicable pretrial procedures for the Ninth Circuit has posited that the only means available for the district court to reverse or modify a prior ruling once it has been entered on the docket is pursuant to either *Fed. R. Civ. Proc. 59(e)* or *60(b)*. See Schwarzer, Tashima and Wagstaffe, (Rutter Practice Group) *Federal Civil Procedure Before Trial*, § 12:157.

The Petitioners contend that the caveat attached by the district court to the dismissal on March 24, 2004, namely that the dismissal would be vacated and restored to the calendar for further proceedings, if a party certified within 90 days " . . . that settlement has not in fact occurred . . . " was merely placing all parties on notice, and not just the Respondent, that the court would consider the failure to consummate the settlement within 90 days "good cause" to vacate the dismissal pursuant to a motion filed in accordance with *Fed. R. Civ. Proc. 60(b)* as authorized by the holding in ***Keeling v. Sheet Metal Workers International Assn.***, 937 F.2d 408 (9th Cir. 1991).

The Petitioners maintain that without an order vacating and setting aside the dismissal of March 24, 2004 in compliance with *Rules 58(a)* and *79(a)* of the *Federal Rules of Civil Procedure*, the order remained on the docket as an order which was not amended, modified, or vacated. Cf. ***Bailey v. Potter***, 478 F.3d 409, 412 (D.C. Cir. 2007) [which held that when a dismissal in conformity with *Fed. R. Civ. Proc. 58(a)* has not been entered on the docket as required by *Fed. R. Civ. Proc. 79(a)* the district court retains subject matter jurisdiction]. The terms of the order did not contemplate any further action by the district court on the merits of the lawsuit until such time as the order was duly set aside. Consequently, the Petitioners assert that the Order of March 24, 2004 (App. 16) was a final order when entered and would remain a final order until properly vacated pursuant

to a motion made in accordance with either *Fed. R. Civ. Proc. 59(e)* or *60(b)*.

However, the court of appeals in ***Delil*** (App. 1-3), without the citation of any legal authority, held that when the Respondent certified to the district court "that not all aspects of the lawsuit had settled (App. 42-43), the order (dismissal of March 24, 2004, App. 16) was automatically vacated." (App. 2)

This holding eviscerates the procedural rules requiring the Respondent to file a *Rule 60(b)* motion and for the district court to conduct a hearing and issue findings of fact that the conditions subsequent, attached to the March 24, 2004 dismissal, had not occurred; and, thereafter file a separate document in accordance with *Rules 58(a) and 79(a)* vacating and setting aside the prior order.

The decision in ***Delil*** sanctioned a procedure for vacating a dismissal that is not authorized by the language in either *Fed. R. Civ. Proc. 59(e)* or *60(b)*, or any other reasonable interpretation of either rule. Such a novel and heretofore unprecedented deviation from the federal rules if not discouraged will cause chaos with respect to finality of orders that are of record, as well as a denial of procedural due process to the opposing party with regard to notice of the event, the right to file opposition and have a hearing

thereon, and the right to appeal the subsequent order vacating the dismissal.[8]

B. Was the entry pursuant to *Fed. R. Civ. Proc. 79(a)* of a separate order as required by *Fed. R. Civ. Proc. 58(a)* necessary to vacate the dismissal with prejudice entered on March 24, 2004?

The record on appeal does not reflect that the clerk of the district court entered on the docket an order vacating the March 24, 2004 dismissal, which is in conflict with the express holding in ***Delil*** that the order was automatically vacated. (Docket, App. 26-41)

Rule 58(a)(1) of the *Federal Rules of Civil Procedure* requires *inter alia* that: "Every judgment and amended judgment must be set forth on a separate document. . . ." Since a dismissal with prejudice is an adjudication of all the issues raised by the pleadings, it qualifies as a judgment, and an order vacating a judgment, therefore, would be an amendment to a judgment.

Moreover, for an order vacating the dismissal to be effective the order had to be entered on the docket

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[8] Unless an order is issued in conformity with *Fed. R. Civ. Proc. 58(a)* and *79(a)* there is no final order from which an appeal would lie and there would be no appellate jurisdiction pursuant to *28 U.S.C. § 1291*. See, e.g., ***Weldon v. United States***, 196 F.2d 874, 875-876 (9th Cir. 1952); ***Calhoun v. United States***, 647 F.2d 6 (9th Cir. 1981).

in accordance with *Fed. R. Civ. Proc. 79(a)* which requires that the clerk of the court must keep a record of every order made and record the entry of the order on the docket of the court. See, e.g., ***Weldon v. United States***, 196 F.2d 874, 875-876 (9th Cir. 1952); ***Calhoun v. United States***, 647 F.2d 6 (9th Cir. 1981); cf. ***Bailey v. Potter***, 478 F.3d 409, 412 (D.C. Cir. 2007).

Furthermore, the holding in ***Delil*** that an order of dismissal once entered can be automatically vacated runs contrary to the application and construction of *Rule 60(b) of the Federal Rules of Civil Procedure* and the decision of this Court in ***Bank of Nova Scotia v. United States***, 487 U.S. 250, 254-255 (1988). Compliance with the procedural requirements of *Rule 60(b)* is the only manner by which an order entered on the docket can be vacated by the district court, except for fraud.[9] See generally, ***Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership***, 507 U.S. 380 (1993).

Rule 60(b) states, *inter alia*, that:

> On **motion** and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

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[9] See Annotation, 116 L.Ed.2d 1045 (2006) which collects and discusses the recent cases of the Supreme Court which have analyzed the construction and application of *Fed. R. Civ. Proc. 60(b)*.

> (1) mistake, inadvertence, surprise, or excusable neglect . . . (6) any other reason justifying relief from the operation of the judgment.

[Emphasis added.]

The Respondent did not file a motion pursuant to any provision of *Fed. R. Civ. Proc. 60(b)* and the district court did not, at any time, grant *sua sponte* an order vacating the dismissal for fraud or for any other reason, and thereafter have the clerk of the court enter the written order. (Docket, App. 26-41)

After the on-the-record settlement of the Respondent's ADA claims on March 12, 2004 (App. 26, DE 36) and the dismissal on March 24, 2004 (App. 26, 37) the Respondent's remedy was the enforcement of the terms of the May 10, 2004 written settlement agreement between the parties (App. 18) by an action brought in state court. ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994).

The Respondent could not reopen the litigation to renegotiate the terms of the executed settlement agreement. To the contrary, the Respondent, as well as the Petitioners, was bound by the terms of contractual agreement which the district court lacked the power to modify or enforce. ***Ibid.***

Thus, the Petitioners request the Court grant this petition and overrule the express holding by the Ninth Circuit in ***Delil***, that the district court had the inherent power to allow the Respondent to simply certify " . . . that a settlement of all aspects of the

lawsuit have (sic) not occurred" and the dismissal with prejudice would be vacated without further order of the district court.

As noted previously, the dismissal entered on March 24, 2004 (App. 16) was never vacated by a separate order as required by *Fed. R. Civ. Proc. 58(a)* or entered on the docket in accordance with *Fed R. Civ. Proc. 79(a)*. (App. 26-41) Therefore, the district court upon the entry of the dismissal with prejudice on March 24, 2004 lost subject matter jurisdiction to affect the rights of the parties thereafter (***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994)) and the power to grant the Respondent an award of statutory attorney's fees, regardless of when the dismissal became final. ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.***, 532 U.S. 598, 604 n. 7 (2001).

Moreover, the district court, contrary to the holding in ***Delil***, did not have jurisdiction to enter a subsequent dismissal with prejudice pursuant to *Fed. R. Civ. Proc. 41(a)(1)(ii)* on July 19, 2004 that incorporated the settlement agreement by reference in accordance with the terms of the subsequent stipulation. (App. 17-20)

Unless the district court entered a separate order pursuant to *Rule 58(a)* which vacates and sets aside the order of March 24, 2004 (App. 16), the July 19, 2004 order could not resurrect the subject matter jurisdiction of the district court, which had been lost, to allow enforcement of the settlement agreement and thereby form the basis for the district court awarding

the Respondent attorney's fees. See ***Bender v. Williamsport Area Sch. Dist.***, 475 U.S. 534, 541 (1986); ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994). Since the district court did not have the jurisdiction to enter the subsequent dismissal incorporating the settlement agreement, the July 19, 2004 order (App. 17-20) could not serve as a basis for awarding statutory attorney fees to the Respondent. ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.***, 532 U.S. 598, 604 n. 7 (2001).

Based on the authority discussed above the Court is requested to grant this petition and resolve the conflict between the holding in ***Delil*** and the applicable procedural rules and decisions cited herein.

C. Did the district court have the inherent power to circumvent the application of Civil Local Rule 54-6 for the Northern District of California and excuse the Respondent from complying with the 14 day provision of the local rule for filing her motion for attorney's fees? See *Bender v. Freed*, 436 F.3d 747 (7th Cir. 2006); *IPXL Holdings, LLC v. Amazon.Com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005); *Tancredi v. Metropolitan Life Ins. Co.*, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003).

The appellate court in ***Delil*** stated that: "In the face of its own agreement that attorney's fees be

negotiated or determined by the court, it is disingenuous for the Lodge to contend that Delil had a duty to file a separate and superfluous motion for fees by August 2, 2004." (App. 3)

The agreement referenced in the above quotation is the stipulation and order of July 19, 2004. (App. 17-20) There is nothing in the stipulation or order that referenced an open extension of time or waiver of the time limitations set forth in Civil Local Rule 54-6 for the Respondent to file her motion for attorney's fees. The stipulation and order clearly stated that if the attorney's fee issue could not be resolved by negotiation, the Respondent would be required to file a motion with the district court.

The parties had been negotiating the issue of the Respondent's request for attorney's fees since March 12, 2004. (App. 26, DE 36) The issue was very contentious and Respondent's counsel was reluctant to release his time records without a stipulation and order of the district court which was first obtained on or about April 6, 2004. (App. 27, DE 38) The parties could not make any headway in resolving the attorney's fee issue even after the settlement agreement was executed on May 10, 2004.[10] (App. 18) By the time the stipulation and order was signed by the district court on July 19, 2004 the parties had been

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[10] The settlement agreement is included in its entirety at pages 25-46 of the Excerpts of Record on Appeal.

negotiating the issue of attorney's fees for over four (4) months without any progress. (App. 17-20)

The relevant language of the stipulation and order of July 19, 2004 is set forth below.

The stipulation part of the order recited *inter alia* that the parties had settled the damages and injunctive part of the case by May 10, 2004, " . . . which leaves the attorneys' fees, litigation expenses, and costs aspects of the Lawsuit for resolution by negotiation or subsequent motion to the Court." (App. 18)

The following language was used in the order section of the document:

> The attorneys' fees, litigation expenses, and costs aspects of the Lawsuit shall be resolved by negotiation or, if unsuccessful, by a subsequent motion to the Court.
>
> The Court shall retain jurisdiction to interpret and enforce the terms of the "Mutual Release and Settlement Agreement For Injunctive Relief and Damages Only" incorporated by reference herein and to render a decision on any motion made to the Court for attorneys' fees, litigation expenses, and costs. (App. 20)

The decision in ***Delil*** focused on the language in the order which stated that the district court " . . . would retain jurisdiction . . . to render a decision on any motion made to the [c]ourt for attorneys' fees, litigation expenses, and costs." (App. 3)

The prior decisions of this Court in ***White v. New Hampshire Dept. of Employment Security***, 45 U.S. 445, 451 (1982) and ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196, 200 (1988) concluded that a motion for attorney's fees is collateral to and separate from the decision on the merits. Furthermore, where the fee claim is based upon a fee-shifting statute, as in this case, the district court must wait until the merits of the case have been decided before it can make a determination regarding the "prevailing party." ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.***, 532 U.S. 598 (2001).

Consequently, the district court in ***Delil*** could not entertain the Respondent's motion for attorney's fees until the merits of the case were decided. *Fed. R. Civ. Proc. 54(d)(2).* Moreover, until the district court incorporated the settlement agreement into its order on July 19, 2004 (App. 20) it had no statutory authority to award any attorney's fees to the Respondent as the "prevailing party." The district court was required to retain jurisdiction to enforce the terms of the settlement agreement because of the holding in ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994) before the Respondent could be considered the "prevailing party" as required by *42 U.S.C. § 12205*, pursuant to the holding in ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.***, 532 U.S. 598, 604 n. 7 (2001).

Therefore, the use of the term "retain jurisdiction . . . to render a decision on any motion for attorneys' fees . . . " (App. 20) did nothing more than affirm that the district court had jurisdiction pursuant to the holdings in ***Kokkonen*** and ***Buckhannon*** to hear a motion for attorney's fees brought pursuant to *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure.*

There was no language used in either the stipulation or order of July 19, 2004 that referred to when the Respondent was required to file her motion for attorney's fees. Furthermore, there was no language used in the order which could be construed as waiving the applicability of the time requirements of Civil Local Rule 54-6. (App. 17-20) To the contrary, the order was silent as to when the Respondent had to file her motion for attorney's fees.

Both the district court in its order awarding fees (App. 4-15) and the appellate court in its decision (App. 1-3) held basically that there was simply no time limitation placed upon the Respondent as to when she had to file her motion for attorney's fees. Compare the holdings in ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006) **and** ***IPXL Holdings, LLC v. Amazon.Com, Inc.***, 430 F.3d 1377 (Fed. Cir. 2005) with rationale in the order of the district court and decision of the appellate in ***Delil***. (App. 1-15)

The last sentence of the appellate decision in ***Delil*** is both puzzling and confusing. As noted above, the decision states that "it is disingenuous for the Lodge to contend that Delil had a duty to file a **separate** and

superfluous motion for fees by August 2, 2004." (App. 3) [Emphasis added.]

The puzzling part of the sentence is the use of the words "separate" and "motion" and the date August 2, 2004. The date of August 2, 2004 is 14 days after the entry of the stipulation and order dismissing the action. (App. 17, 30, DE 54) Since the Respondent had not filed any previous motion for fees, (Docket, App. 24-41) the decision does not explain why the Respondent did not have a duty to file a "separate" motion for attorney's fees within the 14 day time limit established by the Civil Local Rule 54-6. See ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006). Nor, does the appellate court explain why a separate motion for attorney's fees was superfluous, i.e., unnecessary, considering *Fed. R. Civ. Proc. 54(d)(2)(B)*, as well as the local Rule, requires the filing of a motion. Hence, a separate motion for fees was required by the rules.

The fact that the parties stipulated to negotiate further could not relieve the Respondent of her "duty" to comply with Civil Rule 54-6. The Rule clearly states that: "Unless otherwise **ordered by the Court after a stipulation to enlarge time** under Civil L.R. 6-2 or a motion under Civil L.R. 6-3 motions for awards of attorney's fees by the court **must be served and filed within 14 days** of entry of judgment. . . ." [Emphasis added.] ***Ibid.***

The July 19, 2004 stipulation and order (App. 17-20) did not contain any specific stipulation or order to

enlarge the time to file the fee motion as required by Civil Local Rule 54-6. Therefore, according to the local Rule, the Respondent, after the entry of the order on July 19, 2004 (App. 30, DE 54), had to do something to enlarge the time to file her motion, or file the motion within 14 days of the entry of the order, or resolve the fee dispute within the 14 days. As noted previously, the Respondent did not file her motion for attorney's fees until November 23, 2004, eight (8) months after the entry of the March 24, 2004 dismissal and four (4) months after the stipulation and order dismissing the case on July 19, 2004. (App. 31, DE 58)

Numerous decisions have held that: "Rules of practice adopted by the United States District Courts . . . have the force and affect of law, and are binding upon the parties and the court which promulgated them until they are changed in the appropriate manner." ***Woods Construction Co., Inc. v. Atlas Chemical Industries, Inc.***, 337 F.2d 888, 890 (10th Cir. 1964), citing ***Weil v. Neary,*** 268 U.S. 160, 169 (1929). The district court was required to follow the local rules and could not use its supervisory powers to circumvent the clear mandate of the local procedural rules. See ***Bank of Nova Scotia v. United States***, 487 U.S. 250, 254-255 (1988). The decision in ***Delil*** and the order of the district court awarding attorney's fees which sanctioned the untimely filing of the Respondent's motion is contrary to the published

opinions in the Second, Sixth, Seventh, Eleventh, and Federal Circuits.[11]

The holding in ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006) is instructive, especially considering the appellate court's comments with regard to the parties' knowledge that a fees motion would be filed by the "prevailing party."

In ***Bender***, the real party in interest was an ERISA "Plan." In the underlying litigation the Plan had moved for summary judgment against Bender and requested attorney's fees pursuant to *29 U.S.C. § 1132(g)*. The district court granted the motion for summary judgment but denied the request for attorney's fees at that time. The final judgment on the reimbursement claim was entered on August 24, 2004. Thirty-four days later on September 27, 2004 the Plan filed its second motion seeking attorney's fees from Bender pursuant to *§ 1132(g)*. The district court denied the motion for attorney's fees as untimely pursuant to *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure*. ***Id.*** at 436 F.3d at 749.

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[11] The following are some of the relevant cases of the Courts of Appeals: ***Weyant v. Okst***, 198 F.2d 211 (2d Cir. 1999); ***Tancredi v. Metropolitan Life Ins. Co.***, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003); ***Allen v. Murph***, 194 F.3d 722 (6th Cir. 1999); ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006); ***Quick v. Peoples Bank of Cullman County***, 993 F.2d 793 (11th Cir. 1993); ***IPXL Holdings, LLC v. Amazon.Com, Inc.***, 430 F.3d 1377 (Fed. Cir. 2005); see ***Port of Stockton v. Western Bulk Carriers***, 371 F.3d 1119 (9th Cir. 2004).

On appeal the Plan did not explain why it failed to file its motion within the 14 day time period required by *Rule 54(d)(2)(B)*. Instead the Plan insisted that the

> district court should have considered it anyway, because "all the parties were well aware of the Plan's intention to file a motion for attorney's fees long before the entry of judgment," and discussion during telephonic pretrial conference "left no room for doubt that the Motion would be filed post-judgment." **This is not a legal argument**; it is an appeal to fairness based upon an absence of prejudice, without a corresponding claim that compliance with the deadline imposed by *Rule 54(d)(2)* was impossible or impracticable or that the Plan's noncompliance was for some reason excusable. We are not persuaded. The Plan missed the deadline under *Rule 54(d)(2)* and offers no reason for having done so. **The fact that the parties "were aware" that the Plan intended to file a fees motion at some indeterminable date in the future does not excuse noncompliance with the procedural rules.** ***Id.*** at 436 F.3d 750. [Emphasis added.]

The rationale of the Plan in ***Bender*** is essentially the rationale set forth in the decision of the appellate court in ***Delil*** which the Seventh Circuit found unpersuasive. It must be noted that the filing of the motion to extend the time to file for fees is no more superfluous than the filing of a motion to extend time to file a motion for a new trial or for a notice of

appeal. As this Court has noted on many occasions, the jurisdiction of the federal courts is granted by the Constitution or by statute, and not by the stipulation of the parties, or an individual court's opinion that a motion to enlarge time pursuant to the applicable procedural rules would be superfluous.

As in ***Bender***, the Respondent has offered no explanation for her waiting an additional four months after the July 19, 2004 order (App. 17-20) to file her motion for attorney's fees, and the appellate decision in ***Delil*** is unquestionably at odds with the decisions in ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006); ***IPXL Holdings, LLC v. Amazon.Com, Inc.***, 430 F.3d 1377 (Fed. Cir. 2005); ***Tancredi v. Metropolitan Life Ins. Co.***, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003).

CONCLUSION

The *Federal Rules of Civil Procedure* were established, in part, to provide a mechanism to ensure the accuracy and clarity of the district court record so that the appellate courts could rely upon the district court docket with some assurance that the orders and judgments brought before them on appeal were final as defined *28 U.S.C. § 1291*. The requirement that a judgment or amendment to the judgment be set forth in a separate document and entered on the docket of the district court as provided by *Rules 58(a)* and *79(a)* of the *Federal Rules of Civil Procedure,* which has

been extended to orders as well, are essential elements in guaranteeing the accuracy, clarity, and finality of the events that occurred in the district court.

This Petition for Certiorari presents the Court with the opportunity to resolve the important procedural issue concerning the mechanisms necessary for vacating an order of dismissal entered on the docket of the district court, as well as resolve a conflict between the Ninth Circuit and the other Circuits as to whether the record must reflect that a fee applicant either filed a motion for fees in compliance with *Rule 54(d)(2)* of the *Federal Rules of Civil Procedure* or obtained an enlargement of time in accordance with the applicable federal or local rules.

For the reasons stated herein the Petitioners respectfully request that the Court grant this petition and reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOLLYNN DELIL, Plaintiff-Appellee, v. POINT REYES SEASHORE LODGE; et al., Defendants-Appellants.	No. 05-16781 D.C. No. CV-03-00010-SI MEMORANDUM* (Filed Nov. 16, 2007)

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted November 5, 2007
San Francisco, California

Before: NOONAN and McKEOWN, Circuit Judges, and TRAGER**, Senior Judge.

Point Reyes Seashore Lodge, Jeffrey S. Harriman, and Thomas R. Harriman (collectively, the "Lodge") appeal the district court's award of attorney's fees to Hollynn Delil ("Delil"). The parties are familiar with the facts. We proceed to the law.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable David G. Trager, Senior United States District Judge for the Eastern District of New York, sitting by designation.

Subject Matter Jurisdiction

The district court preserved jurisdiction following the March 24, 2004 Order of Dismissal Upon Settlement (the "March 2004 Order"). The Lodge's argument that the March 2004 Order was unconditional is unpersuasive. When Delil certified that not all aspects of the lawsuit had settled, the order was automatically vacated.

The Lodge's reliance on *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375 (1994), and *Hagestad v. Tragesar,* 49 F.3d 1430 (9th Cir. 1995), is misplaced. *Kokkonen* did not involve a conditional order and has no application to this case. In *Hagestad,* the condition for vacating the dismissal order was never met; the 90-day deadline had passed when the court attempted to reassert jurisdiction. It, too, is inapposite.

The July 2004 Stipulation and Order

The Lodge tries a second shot, equally unpersuasive: Delil did not move for fees within 14 days of the entry of the Stipulation and Order for Dismissal of the Injunctive Relief and Damages Aspects of the Lawsuit, filed on July 19, 2004. As this document recites the parties' agreement that they will "leave [ ] the attorneys' fees, litigation expenses, and costs aspects of the [l]awsuit for resolution by negotiation or subsequent motion of the court," the Lodge's attempt to back out of this agreement now is totally at odds with the parties' understanding. The court

stated as part of the same stipulation and order that it would "retain jurisdiction to interpret and to enforce the terms of the [settlement agreement] and to render a decision on any motion made to the [c]ourt for attorneys' fees, litigation expenses, and costs."

In the face of its own agreement that attorneys' fees be negotiated or be determined by the court, it is disingenuous for the Lodge to contend that Delil had a duty to file a separate and superfluous motion for fees by August 2, 2004.

For the reasons stated, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL,

Plaintiff,

v.

POINT REYES SEASHORE LODGE; JEFFREY F. HARRIMAN; and THOMAS R. HARRIMAN,

Defendants. /

No. C 03-00010 SI

ORDER AWARDING ATTORNEYS' FEES AND COSTS

(Filed Aug. 9, 2005)

Currently pending is plaintiff's motion for attorneys' fees and costs. Having carefully considered the arguments of counsel and the papers submitted, the Court hereby GRANTS IN PART plaintiff's motion and awards fees and costs as set out below.

BACKGROUND

Plaintiff Hollynn Delil[1] is physically disabled and requires the use of a wheelchair. Plaintiff visited the

[1] Plaintiff brings this action under the name "Hollynn Delil." *See* Delil Declaration. However, plaintiff also uses the name "HolLynn D'Lil." *See* Delil Decl., Ex. 1 (providing copy of plaintiff's resume). Defendants also present evidence that plaintiff has filed lawsuits under both names. *See* Brown Decl., Exs. D, E. Plaintiff provides no explanation for the variety of names used, even within her own declaration.

Point Reyes Seashore Lodge in Fall 2001.[2] After this visit, plaintiff wrote a letter to defendants detailing alleged disability access barriers. Defendants responded to the letter, and made some of the changes suggested by plaintiff. Plaintiff returned to the lodge on August 20, 2002. Plaintiff was not satisfied by the disability access provided by defendants and the parties again exchanged letters. Plaintiff then filed suit in this Court in January 2003, alleging violations of the Americans with Disabilities Act and the various California codes. Plaintiff requested injunctive relief, damages, and fees and costs.

The parties conducted some discovery and extensive settlement negotiations. No dispositive motions were filed by the parties and the Court dismissed the case on March 24, 2004, after the parties reached a settlement. The parties were unable to agree on the issue of attorneys' fees and costs, leaving plaintiff to file the current motion.

DISCUSSION

1. Attorneys' fees

Plaintiff's motion for attorneys' fees and costs is brought under both federal and state law. The federal authority to award attorneys' fees is derived in part from Section 505 of the ADA, which provides that "in

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[2] The Point Reyes Seashore Lodge is a 23 room lodge in Olema, California. Construction began on the lodge in 1987.

any action or administrative proceeding commenced pursuant to [the ADA], the court or agency, in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. Plaintiffs are entitled to fees under the ADA using the "lodestar" measure of fees, which is obtained by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate. *See Jordan v. Multnomah County,* 815 F.2d 1258, 1262 (9th Cir. 1987) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933 (1983)). In evaluating what is a reasonable number of hours, the Court must review detailed time records to determine whether the hours claimed by the applicant were unnecessary, duplicative or excessive. *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g denied, amended on other grounds,* 808 F.2d 1373 (9th Cir. 1987).

Plaintiff is also entitled to attorneys' fees as the prevailing party under California law. Under California Code of Civil Procedure § 1021.5, plaintiff is entitled to attorneys' fees for enforcing "an important right affecting the public interest," if a "significant benefit ... has been conferred on the general public or a large class of persons." Providing access to disabled individuals constitutes an important right affecting the public interest. California Government Code § 19230. State law also establishes the lodestar method as the proper method of calculation. *Crommie v. State of California,* 840 F.Supp. 719, 724-25 (N.D. Cal. 1994).

Plaintiff requests an award of fees in the amount of $186,800 and costs of $14,300. Plaintiff also requests an 2.0 multiplier to the lodestar amount, creating a total requested award for attorneys' fees and costs of $387,500.

A. Plaintiff is entitled to attorneys' fees as the prevailing party

Defendants dispute plaintiff's entitlement to attorneys' fees under the ADA and the California "private attorney general" statute, claiming that plaintiff did not file her motion for fees in a timely fashion. Defendants argue that the Court's July 19, 2004 Order dismissing the case under Federal Rule of Civil Procedure 41(a)(1)(ii) was a final judgment or order. Defendants assert that plaintiff then had 14 days after the Court's July 2004 Order to file her motion for attorneys' fees under Federal Rule of Civil Procedure 54(d)(2). However, plaintiff's motion was not filed until November 23, 2004. Therefore, defendants argue that plaintiff failed to comply with the timeliness requirements of Rule 54(d) and should not receive an award of fees.

Even if Rule 54 applies to the circumstances of this case, the Court finds that plaintiff's motion was timely. The rule provides that the motion for fees must be filed within 14 days of entry of judgment, "unless otherwise provided by statute or order of the court." The Court's Order of July 19, 2004 stated that it would retain jurisdiction over rendering a decision

on any fees motion. The Order also stated that the parties were to resolve the fees issue by negotiation if possible. Finally, the Court's August 25, 2004 Order stated that plaintiff could seek fees and costs through "a regularly scheduled motion."

The Court finds that the August 25, 2004 Order provided that plaintiff was not required to file her motion for attorneys' fees and costs within 14 days of the stipulated dismissal, given that the Order was issued more than one month after the dismissal order.

Defendants also argue that plaintiff is not entitled to fees because she did not make a reasonable attempt to settle the dispute prior to litigation. Defendants assert that plaintiff must engage in a reasonable attempt to settle her dispute prior to litigation, under *Graham v. Daimler Chrysler Corp.*, 34 Cal.4th 553 (2004). However, *Graham* establishes this requirement only for plaintiffs asserting the "catalyst" theory for recovery of fees under CCP § 1021.5. The catalyst theory allows for the recovery of attorney fees "even when the litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation." *Id.* at 560.

The catalyst theory does not apply in this case, as plaintiff obtained a judicially enforceable settlement that included monetary damages and injunctive relief against defendants. Therefore, plaintiff has a basis for claiming to be the "prevailing party" other than

"[her] being the catalyst of policy change." *Barrios v. California Interscholastic Federation,* 277 F.3d 1128, 1134 n. 5 (9th Cir. 2002). Instead, the settlement agreement establishes a "legally enforceable instrument" that makes her the "prevailing party." *Id.*; *see also Richard S. v. Department of Developmental Services,* 317 F.3d 1080, 1087 (9th Cir. 2003). Therefore, the Court finds that plaintiff is entitled to attorneys' fees as the prevailing party in this action.

B. Hourly rate

Plaintiff requests the following hourly rates for counsel: $420[3] for Sidney Cohen; $395 for Paul Rein; and $345 for Patricia Barbosa. Plaintiff also requests $125 an hour for paralegal Scott Holmes. In support of her motion, plaintiff submits substantial evidence that the claimed fees are reasonable given the education, skill and experience of counsel, the amount they normally charge for their legal services and the market rate for attorneys of comparable skill and experience. *See* Cohen Decl. at ¶ 29; Rein Decl. at ¶ 38; Barbosa Decl. at ¶ 6-11; Pearl Decl. at 11. Defendants present no evidence that counsel's rates are unreasonable. Therefore, the Court finds that the hourly rates are reasonable.

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[3] This rate applies to work performed by Cohen in 2003-2005. Cohen's hourly rate in 2002 was $390, and he requests fees based on that rate for work performed in 2002.

C. Reasonable hours expended

Plaintiff request an award compensating counsel for over 450 hours of attorney and paralegal time and assert that this time was reasonably spent on litigation. Defendants argue that the results could have been achieved with significantly less work and request a drastic reduction in the number of hours factored into the lodestar.

i. Rein and Barbosa

Plaintiff seeks payment for over 80 hours of time spent by attorneys Rein and Barbosa. Defendants argue that it was excessive for three lawyers to represent plaintiff in this matter. The Court agrees. The case was a typical ADA case that did not involve unique factual or legal issues. Plaintiff is well-versed in the state and federal disability provisions and identified a number of violations in her multiple visits to the premises. Therefore, liability was not in question during the litigation. Instead, the litigation consisted of a prolonged settlement negotiation. This is demonstrated by the fact that the parties did not file a single substantive motion with the Court.

Given this set of circumstances, it was unnecessary for Cohen to include additional attorneys in the case. Cohen justifies his high hourly rate by citing his skills and experience in ADA cases. If Cohen is an attorney worthy of such an hourly rate, then he should not require the assistance of additional attorneys to handle such a straightforward case. In reviewing the

time sheets submitted by Paul Rein, the Court finds that many of the entries consist of telephone calls with co-counsel Cohen. In other entries, Rein reviews documents created by Cohen. Many of the tasks listed by Rein in his declaration demonstrate the repetitive nature of his involvement. These tasks include countless references to "reviewing" the various documents in the case. Rein Decl. at ¶ 6. Rein also gives a [sic] various descriptions to essentially the same activity – talking with Cohen – such as: "meetings, braintrusting, [and] consulting with co-counsel"; "consultation" re: various topics; and "calls . . . with co-counsel."

Given the straightforward nature of this case, the Court finds it was unnecessary for a well-qualified, highly compensated lawyer such as Cohen to need another attorney to "consult" and or "brainstorm" with. Cohen is requesting compensation for over 350 hours of his own time on this case, which the Court finds is more than sufficient to obtain the results in this case. Therefore, the Court will not award fees based on the time submitted for Paul Rein, which the Court finds was unnecessary.

For the same reasons, the Court will not award attorneys' fees for the time of Patricia Barbosa.[4]

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[4] Most of Barbosa's time entries also consist of "conferences" with co-counsel.

ii. Cohen

Sidney Cohen served as lead counsel and requests an award for over 350 hours of his time spent litigating the case. Defendants argue that plaintiff should not receive an award for fees after July 22, 2003 because "all legitimate issues were resolved" on that date. However, this statement is incorrect. As of July 2003, several issues remained that were not resolved until the Settlement Agreement, including a lift for the breakfast area, handrails, and a pathway to the Casa Olema Area. *Compare* Brown Decl., Ex. O *with* Cohen Decl., Ex. 2. Therefore, the Court finds that it is proper to award fees for work performed after July 22, 2003.

Plaintiff produced the handwritten time sheets compiled by Cohen during the course of the litigation, which the Court has reviewed. *See* Cohen Decl., Ex. 3; Cohen Reply Decl., Ex. 1; and Supp. Cohen Decl., Ex. 1. The Court finds that the hours documented by Cohen are, although generous, not unreasonable. Defendants presented a thorough, painstaking and often contentious defense, which required the parties to engage in multiple mediations and other settlement negotiations and substantially extended the time required to complete the case. Therefore, the Court will award attorneys' fees for Cohen based on 367 hours reasonably expended on litigation.

2. Multiplier

Plaintiff also requests a multiplier of 2.0 to the lodestar amount because of the results obtained, the importance of the case, and the contingent nature of plaintiff's fees. Although federal law does not permit an enhancement to the lodestar based on contingent risk, California law, by contrast, permits such enhancements under state fee-shifting statutes. *See, Ketchum v. Moses,* 24 Cal.4th 1122, 1136-37 (2001); *Serrano v. Priest,* 20 Cal.3d 25 (1977). The Ninth Circuit has held that where plaintiffs succeed on both federal and state statutory grounds, it is appropriate to enhance the lodestar fee with a multiple based on state law. *Mangold v. California Public Utilities Commission,* 67 F.3d 1470, 1478 (9th Cir. 1995). In addition to contingent risk, California law also allows courts to consider the results obtained and the importance of the case to plaintiff and the public when determining if an enhancement to the lodestar amount is appropriate. *Serrano,* 20 Cal.3d at 48-49.

The Court finds that an enhancement to the lodestar amount is not appropriate in this instance. As described above, this was a straightforward disability case that did not require exceptional work on the part of plaintiff's counsel to obtain the Settlement Agreement reached by the parties. Liability was not in question in this case.[5] Plaintiff and her counsel

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[5] Plaintiff does not identify any contingent risk involved in the case, aside from stating that "[a]ll cases, no matter how

(Continued on following page)

are well-versed in disability law and repeat players in disability litigation. There were no substantive motions filed, nor were there any novel legal issues. Therefore, the Court finds that plaintiff should not receive an enhancement on the lodestar amount.

3. Costs

Plaintiff requests an award of $13,904 for costs incurred by attorney Cohen during litigation (see Cohen Decl., Ex. 5), and $396 for costs incurred by attorney Rein. The Court will not award costs for Rein, as he presents no documentation in support of them. Defendants challenge the fees paid by Cohen for plaintiff's expert, claiming that all work after July 2003 was unnecessary. As described above, the Court finds that plaintiff should receive compensation for fees and costs incurred after July 2003. Defendants also challenge plaintiff's use of a courier service to deliver documents to defense counsel. The Court finds that the use of a courier service is appropriate and compensable. Therefore, the Court awards $13,904 in Cohen's costs.

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strong on the merits, run the risk of losing." Pl.'s Mot. at 22. The Court finds this is not sufficient to warrant an enhancement.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART plaintiff's motion for attorneys' fees and costs:

1) Attorneys' Fees for Sidney Cohen in the amount of $154,975:

   - 2002: 14.1667 hours x $390/hour = $5,525
   - 2003-05: 352 hours x $420/hour = $149,450

2) Costs in the amount of $13,904

[Docket # 58]

IT IS SO ORDERED.

Dated: August 9, 2005

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL,

Plaintiff,

v.

PT REYES SEASHORE LODGE,

Defendants. /

No. C 03-00010 SI

ORDER OF DISMISSAL UPON SETTLEMENT

(Filed Mar. 24, 2004)

The parties to the action, by their counsel, have advised the court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, that if any party hereto certifies to this court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

Dated: 3/23/04

s/ Susan Illston
SUSAN ILLSTON
United States District Judge

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Attorneys for Plaintiff
HOLLYNN DELIL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL

Plaintiff,

v.

POINT REYES SEASHORE LODGE; JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN; and DOES 1-25, Inclusive,

Defendants.

/

CASE NO.
C 03 0010 SI EMC

Civil Rights

STIPULATION AND ORDER [PROPOSED] FOR DISMISSAL OF THE INJUNCTIVE RELIEF AND DAMAGES ASPECTS OF THE LAWSUIT

(Filed Jul. 19, 2004)

Plaintiff HOLLYNN DELIL, by and through her attorneys of record, file this Stipulation of Dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii).

Plaintiff filed this lawsuit on January 2, 2003.

Plaintiff HOLLYNN DELIL and Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN have entered into a "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only" which was signed by Plaintiff on April 30, 2004 and by Defendants on May 10, 2004 and which settles the injunctive relief and damages aspects of the Lawsuit against all Defendants and which leaves the attorneys' fees, litigation expenses, and costs aspects of the Lawsuit for resolution by negotiation or subsequent motion to the Court. A copy of the "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only" is incorporated by reference herein as if set forth in full. Plaintiff HOLLYNN DELIL and Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN stipulate to the Court retaining jurisdiction to interpret and to enforce the "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only."

Plaintiff HOLLYNN DELIL moves to dismiss the injunctive relief and damages aspects of the lawsuit with prejudice against Defendants POINT REYES,

SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN.

Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN, who have answered the complaint, agree to the dismissal of the injunctive relief and damages aspects of the Lawsuit with prejudice.

This case is not a class action, and no receiver has been appointed.

This Stipulation and Order may be signed in counterparts.

Wherefore, Plaintiff HOLLYNN DELIL and Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN, by and through their attorneys of record, so stipulate.

Date: 7/13/04

SIDNEY J. COHEN
PROFESSIONAL
CORPORATION
LAW OFFICES OF
PAUL L. REIN

/s/ Sidney J. Cohen
Sidney J. Cohen
Attorney for Plaintiff
Hollynn Delil

Date: 7/12/04

LAW OFFICES OF
MICHAEL E. BROWN

/s/ Michael E. Brown
Michael E. Brown, Esq.
Attorney for Defendants
Point Reyes Seashore
Lodge, Jeffrey F. Harriman,
and Thomas R. Harriman

PURSUANT TO STIPULATION OF THE PARTIES, IT IS SO ORDERED:

The injunctive relief and damages aspects of the Lawsuit against Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN are dismissed with prejudice.

The attorneys' fees, litigation expenses, and costs aspects of the Lawsuit shall be resolved by negotiation or, if unsuccessful, by subsequent motion to the Court.

The Court shall retain jurisdiction to interpret and to enforce the terms of the "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only" incorporated by reference herein and to render a decision on any motion made to the Court for attorneys' fees, litigation expenses, and costs.

Date: 7/16/04

s/ Susan Illston
Susan Illston
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL,

Plaintiff,

v.

POINT REYES SEASHORE LODGE, et al.,

Defendants. /

No. C 03-0010 SI

ORDER

(Filed Aug. 26, 2004)

On July 6, 2004, defendants were ordered to show cause, in writing to be filed by July 16, 2004, why it did not appear at the case management conference held on July 2, 2004, and to respond in writing to plaintiff's proposal concerning attorneys' fees. Defendants have done neither, but the parties did submit, and on July 19, 2004 the Court signed, a Stipulation and Order for dismissal of the injunctive relief and damages aspects of the lawsuit.

Plaintiff now requests that the case be "reopened" and restored to calendar, in order that the fees issue may be resolved. However, since the substantive portions of the action have been dismissed by stipulation, the Court declines to restore the matter to the pending calendar. Rather, the Court orders that if plaintiff seeks to be awarded fees and costs, she may apply for same by a regularly noticed motion, which the Court will hear and decide.

If plaintiff files such a motion, and if defendants desire to oppose the motion in any respect,

then defendants shall, in the first portion of their brief in opposition, SHOW CAUSE why they failed to appear at the case management conference on July 2, 2004; why they failed to respond to plaintiff's proposal with respect to attorneys fees; why they did not comply with this Court's July 6, 2004 Order to Show Cause; and why they should not be sanctioned for all of the above.

IT IS SO ORDERED.

Dated: August 25, 2004 /s/ Susan Illston
SUSAN ILLSTON
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOLLYNN DELIL, Plaintiff-Appellee, v. POINT REYES SEASHORE LODGE; JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN, Defendants-Appellants	No. 05-16781 D.C. No. CV-03-00010-SI Northern District of California, San Francisco ORDER (Dec. 14, 2007)

Before: NOONAN and McKEOWN, Circuit Judges, and TRAGER,*

The petition for rehearing is DENIED.

* The Honorable David G. Trager, Senior United States District Judge for the Eastern District of New York, sitting by designation.

ADRMOP, APPEAL, CLOSED, E-Filing, MEDTERM, REFSET-EMC, REOPEN

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:03-cv-00010-SI
Internal Use Only

Delil v. Point Reyes Seashore Lodge et al
Assigned to: Hon. Susan Illston
Demand: $0
Cause: 42:12101 American w/ Disabilities Act (ADA)

Date Filed: 01/02/2003
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Defendant

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ATTORNEY TO BE NOTICED

Michael E. Brown
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

* * *

03/15/2004	36	Minute Entry: Settlement Conference held 3/12/2004. Partial settlement reached; attorneys' fees remain unresolved. (Date Filed: 3/15/2004). (Court Reporter: N/A; FTR 031204 (1:10); FTR 031204 (4:46).) (emcsec, COURT STAFF) (Date Filed: 3/15/2004) (Entered: 03/15/2004)
03/24/2004	37	ORDER DISMISSING CASE, Signed by Judge Illston on 3/23/04. (ts, COURT STAFF) (filed on 3/24/2004) (Entered: 03/24/2004)

04/06/2004	38	STIPULATION *FOR REVIEW AND RETURN OF PLAINTIFF'S COUNSELS' TIME SHEETS AND BILLING STATEMENTS* by Hollynn Delil. (Cohen, Sidney) (Filed on4/6/2004) (Entered: 04/06/2004)
05/14/2004		Received Document Substitution of Attorney by Jeffrey F. Harriman, Thomas R. Harriman, Point Reyes Seashore Lodge. (ys. COURT STAFF) (Filed on 5/14/2004) (Entered: 05/17/2004)
05/17/2004	39	CLERK'S NOTICE re: Failure to E-File and/or Failure to Register as an E-Filer (substitution of attorney by defendants' counsel), (ys, COURT STAFF) (Filed on 5/17/2004) (Entered: 05/17/2004)
05/17/2004	40	MOTION to Substitute Attorney filed by Jeffrey F. Harriman. (Orlick, Martin) (filed on 5/17/2004) (Entered: 05/17/2004)
05/17/2004	42	ORDER granting defendants' substitution of attorney to Michael E. Brown, Esq.. Signed by Judge Susan Illston on 5/17/04. (ys, COURT STAFF) (Filed on 5/17/2004) (Entered: 05/18/2004)

05/17/2004		***Attorney Michael E. Brown for Point Reyes Seashore Lodge; Jeffrey F. Harriman and Thomas R. Harriman added, Attorney Martin H. Orlick terminated. (ys, COURT STAFF) (Filed on 5/17/2004) (Entered: 05/18/2004)
05/18/2004	41	STIPULATION AND ORDER for review and return of pltf. counsels' time sheets and billing statements. Signed by Judge Illston on 5/17/04. (ts, COURT STAFF) (Filed on 5/18/2004) (Entered: 05/18/2004)
05/18/2004		***Motions terminated: (ts, COURT STAFF) (Filed on 5/18/2004) (Entered: 05/18/2004)
05/19/2004	43	ORDER granting substitution of attorney. (Docket clerk to add counsel to docket sheet.). Signed by Judge Illston on 5/19/04. (ts, COURT STAFF) (Filed on 5/19/2004) (Entered: 05/19/2004)
05/19/2004		***Add/Terminate Attorney. (slh. COURT STAFF) (Filed on 5/19/2004) (Entered: 05/21/2004)
05/31/2004	44	STIPULATION *FOR REVIEW AND RETURN OF PLAINTIFF'S COUNSELS' TIME SHEETS AND BILLING STATEMENTS* by Hollynn Delil. (Cohen, Sidney) (Filed on 5/31/2004) (Entered: 05/31/2004)

06/03/2004	45	CERTIFICATE of Counsel *That Settlement Of All Aspects Of the Lawsuit Have Not Occurred and Proof Of Service* by Sidney J. Cohen on behalf of Hollynn Delil (Cohen, Sidney) (Filed on 6/3/2004) (Entered: 06/03/2004)
06/09/2004	46	CLERK'S NOTICE reopening case and setting conference to occur on 7/2/04 @ 2:30 p.m. (ts, COURT STAFF) (Filed on 6/9/2004) (Entered: 06/09/2004)
06/09/2004		***Case Reopened (ts, COURT STAFF) (Filed on 6/9/2004) (Entered: 06/09/2004)
06/09/2004		Set Deadlines/Hearings: Case Management Conference set for 7/2/2004 02:30 PM. (ys, COURT STAFF) (Filed on 6/9/2004) (Entered: 06/10/2004)
06/16/2004	47	MOTION to Substitute Attorney filed by Jeffrey F. Harriman. (Brown, Michael) (Filed on 6/16/2004) (Entered: 06/16/2004)
06/16/2004	48	MOTION to Substitute Attorney filed by Thomas R. Harriman. (Brown, Michael) (Filed on 6/16/2004) (Entered: 06/16/2004)
06/17/2004	49	JOINT CASE MANAGEMENT STATEMENT (*UPDATED*) filed by Hollynn Delil. (Cohen, Sidney) (Filed on 6/17/2004) (Entered: 06/17/2004)

06/22/2004	50	ORDER granting substitution (Harriman). Signed by Judge Illston on 6/21/04. (ts, COURT STAFF) (Filed on 6/22/2004) (Entered: 06/22/2004)
06/22/2004		***Motions terminated: 47 MOTION to Substitute Attorney filed by Jeffrey F. Harriman, 48 MOTION to Substitute Attorney filed by Thomas R. Harriman. (ys, COURT STAFF) (Filed on 6/22/2004) (Entered: 06/23/2004)
07/06/2004	51	Minute Entry: Further Case Management Conference held on 7/2/2004 before Illston (Date Filed: 7/6/2004). (Court Reporter none.) (ts, COURT STAFF) (Date Filed: 7/6/2004) (Entered: 07/06/2004)
07/06/2004	52	ORDER to Show Cause, Signed by Judge Illston on 7/6/04. (ts, COURT STAFF) (Filed on 7/6/2004) (Entered: 07/06/2004)
07/13/2004	53	Proposed Order *STIPULATION AND ORDER [PROPOSED] FOR DISMISSAL OF THE INJUNCTIVE RELIEF AND DAMAGES ASPECTS OF THE LAWSUIT* by Hollynn Delil. (Cohen, Sidney) (Filed on 7/13/2004) (Entered: 07/13/2004)
07/19/2004	54	ORDER DISMISSING CASE, Signed by Judge Illston on 7/16/04. (ts, COURT STAFF) (Filed on 7/19/2004) (Entered: 07/19/2004)

07/22/2004	55	RESPONSE TO ORDER TO SHOW CAUSE by Hollynn Delil. (Cohen, Sidney) (Filed on 7/22/2004) (Entered: 07/22/2004)
08/12/2004	56	CERTIFICATION THAT SETTLEMENT OF ALL ASPECTS OF THE LAWSUIT HAVE NOT OCCURRED, REQUEST TO RE-OPEN THE CASE, AND REQUEST FOR THE COURT TO FOLLOW UP ON ITS JULY 6, 2004 ORDER TO SHOW CAUSE TO DEFENDANTS by Sidney J. Cohen on behalf of Hollynn Delil (Cohen, Sidney) (Filed on 8/12/2004) Modified on 8/13/2004 (ys, COURT STAFF). (Entered: 08/12/2004)
08/26/2004	57	ORDER re request that the case be "re-opened." Signed by Judge Susan Illston on 8/25/04. (rbc, COURT STAFF) (Filed on 8/26/2004) (Entered: 08/26/2004)
11/23/2004	58	PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND [sic] AND CERTIFICATE OF SERVICE THEREON filed by Hollynn Delil. Motion Hearing set for 1/28/2005 09:00 AM. (Cohen, Sidney) (Filed on 11/23/2004) Modified on 11/24/2004 (ys, COURT STAFF). (Entered: 11/23/2004)

11/30/2004	59	CLERK'S NOTICE Continuing Motion hearing to 2/4/05 (ts, COURT STAFF) (Filed on 11/30/2004) (Entered: 11/30/2004)
11/30/2004		Set/Reset Deadlines as to 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND* [sic] *AND CERTIFICATE OF SERVICE THEREO* [sic]. *Motion Hearing set for 2/4/2005 09:00 AM. (ys, COURT STAFF) (Filed on 11/30/2004) (Entered: 12/01/2004)*
12/13/2004	60	First MOTION to Continue *by Stipulation the Hearing on 58 Plaintiff's Motion for Attorney's Fees and Costs* filed by Point Reyes Seashore Lodge. Motion Hearing set for 2/4/2005 09:00 AM. (Brown, Michael) (Filed on 12/13/2004) Modified on 12/14/2004 (ys, COURT STAFF). (Entered: 12/13/2004)
12/13/2004	61	STIPULATION *to Continue Hearing on 58 Plaintiff's Motion for an Award of Attorney's Fees and Costs* by Point Reyes Seashore Lodge. (Brown, Michael) (Filed on 12/13/2004) Modified on 12/14/2004 (ys, COURT STAFF). (Entered: 12/13/2004)

12/21/2004	62	ORDER continuing motion. Signed by Judge Illston on 12/17/04. (ts, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/21/2004)
12/21/2004		Set/Reset Deadlines as to 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND* [sic] *and CERTIFICATE OF SERVICE THEREO* [sic]. *Motion Hearing set for 3/4/2005 09:00 AM. (ys, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/22/2004)*
12/21/2004		***Motions terminated: (ys, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/22/2004)
01/27/2005	63	Plaintiff's Memorandum Of Points And Authorities In 58 Support Of An Award Of Attorney Fees, Litigation Expenses, And Costs Against Defendants ... filed by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 64 Declaration of Sidney J. Cohen *In Support Of 58 Plaintiff's Motion For An Award Of Attorney Fees, Litigation Expenses, And Costs Against Defendants* . . . filed by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 65 Declaration of Paul L. Rein *In Support of 58 Plaintiff's Motion For An Award Of Attorney Fees, Litigation Expenses, And Costs Against Defendants* . . . filed by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 66 Declaration of Patricia Barbosa *In Support Of 58 Plaintiff's Motion For An Award Of Attorney Fees, Litigation Expenses, And Costs Against Defendants* . . . filed by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 67 Proposed Order *Grantin* [sic] *58 Plaintiff's Motion For An Award Of Attorney Fees, Litigation Expenses, And Costs* by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 68 CERTIFICATE OF SERVICE of 63, 64, 65, 66, 67 by Hollynn Delil (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005) (ys, COURT STAFF). (Entered: 01/27/2005)

02/08/2005 69 Second Ex Parte Application *Of Defendants To Continue Hearing on Plaintiff's Motion for Attorney's Fees and Costs* filed by Point Reyes Seashore Lodge. Motion Hearing set for 3/4/2005 09:00 AM. (Brown, Michael) (Filed on 2/8/2005) (Entered: 02/08/2005)

02/09/2005 70 Plaintiff's Opposition To 60 Defendants' Motion To Continue March 4, 2005 Hearing Date filed by Hollynn Delil. (Cohen, Sidney) (Filed on 2/9/2005) Modified on 2/10/2005 (ys, COURT STAFF). (Entered: 02/09/2005)

02/15/2005 71 ORDER by Judge Illston granting 69 Ex Parte Application; motion for fees continued to 3/25/05 @ 9 a.m. (ts, COURT STAFF) (Filed on 2/15/2005) (Entered: 02/15/2005)

02/15/2005		Set/Reset Deadlines as to 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN AND THOMAS R. HARRIMAND* [sic] *AND CERTIFICATE OF SERVICE THEREO* [sic]. *Motion Hearing set for 3/25/2005 09:00 AM. (ys, COURT STAFF) (Filed on 2/15/2005) (Entered: 02/16/2005)*
02/22/2005	72	CERTIFICATE OF SERVICE of [73], [74], [75], [76] by Point Reyes Seashore Lodge (Brown, Michael) (Filed on 2/22/2005) Modified on 2/23/2005 (ys, COURT STAFF). (Entered: 02/22/2005)
02/22/2005	73	Points and Authorities in Opposition re 58 MOTION for Attorney Fees filed by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman. (Related document(s) 58) (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)
02/22/2005	74	Declaration of Kim R. Blackseth in Support of 58 MOTION for Attorney Fees filed by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman. (Related document(s) 58) (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)

02/22/2005	75	DECLARATION of Jeffrey E. Harriman in Opposition to 58 MOTION for Attorney Fees filed by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman. (Related document(s) 58) (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)
02/22/2005	76	DECLARATION of Michael E. Brown in Opposition to 58 MOTION for Attorney Fees filed by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman. (Related document(s) 58) (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)
02/22/2005	77	CLERK'S NOTICE re: Failure to E-File (Points and Authorities in Opposition to plaintiff's motion for attorney fees and costs, declaration of Kim R. Blackseth, declaration of Jeffrey F. Harriman, Declaration of Michael E. Brown). (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)
03/09/2005	78	Supplemental Declaration of PAUL L. REIN *IN Reply to [73] defendant's Opposition to plaintiff's motion for attorney's fees, litigation expenses, and costs* filed by Hollynn Delil. (Rein, Paul) (Filed on 3/9/2005) Modified on 3/10/2005 (ys, COURT STAFF). (Entered: 03/09/2005)

03/09/2005	79	Plaintiff's Memorandum of Points And Authorities In Reply To [73] Defendants' Opposition To An Award Of Attorneys' Fees . . . " filed by Hollynn Delil. (Cohen, Sidney) (Filed on 3/9/2005) Modified on 3/10/005 (ys, COURT STAFF). (Entered: 03/09/2005)
03/09/2005	80	Declaration Of Sidney J. Cohen In Reply To [73] Defendants' Opposition To Plaintiff's Motion For An Award Of Attorney Fees . . . filed by Hollynn Delil. (Cohen, Sidney) (Filed on 3/9/2005) Modified on 3/10/2005 (ys, COURT STAFF). (Entered: 03/09/2005)
03/09/2005	81	Declaration Of Hollynn Delil In Support Of 79 Plaintiff's Reply To Defendants' Opposition To Plaintiff's Motion For An Award Of Attorney Fees., (Exh. filed manually at Clerk's Office). filed by Hollynn Delil. (Cohen, Sidney) (Filed on 3/9/2005) Modified on 3/10/2005 (ys, COURT STAFF). Modified on 3/10/2005 (ys, COURT STAFF). (Entered: 03/09/2005)
03/09/2005	82	CERTIFICATE OF SERVICE of 78, 79, 80, 81 by Hollynn Delil *Certificate Of Service* (Cohen, Sidney) (Filed on 3/9/2005) Modified on 3/10/2005 (ys, COURT STAFF). (Entered: 03/09/2005)

03/29/2005	83	Minute Entry: Motion Hearing held on 3/25/2005 before Illston (Date Filed: 3/29/2005). (Court Reporter C. Luciano.) (ts, COURT STAFF) (Date Filed: 3/29/2005) (Entered: 03/29/2005)
03/29/2005		Set/Reset Deadlines as to 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND* [sic] *AND CERTIFICATE OF SERVICE THEREO* [sic]. *Motion Hearing set for 4/8/2005 09:00 AM. (ys, COURT STAFF) (Filed on 3/29/2005) (Entered: 03/30/2005)*
04/08/2005	84	Supplemental Declaration of Sidney J. Cohen in Support of 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND* [sic] *AND CERTIFICATE OF SERVICE THEREO* [sic] *filed by Hollynn Delil. (Related document(s) 58) (ys, COURT STAFF) (Filed On 4/8/2005) (Entered: 04/11/2005)*

04/11/2005	85	Minute Entry: Motion Hearing held on 4/8/2005 before Illston (Date Filed: 4/11/2005). (Court Reporter Skillman.) (ts, COURT STAFF) (Date Filed: 4/11/2005) (Entered: 04/11/2005)
08/09/2005	86	ORDER by Judge Illston granting 58 Motion for Attorney Fees (ts, COURT STAFF) (Filed on 8/9/2005) (Entered: 08/09/2005)
09/02/2005	87	NOTICE OF APPEAL as to 57 Order, 86 Order on Motion for Attorney Fees, 54 Order Dismissing Case by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman, Filing fee $ 255, receipt number 3376070. Appeal Record due by 10/3/2005. (ys, COURT STAFF) (Filed on 9/2/2005) (Entered: 09/02/2005)
09/02/2005	88	Representation Statement by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman's counsel Michael E. Brown. (ys, COURT STAFF) (Filed on 9/2/2005) (Entered: 09/02/2005)
09/02/2005		Transmission of Notice of Appeal, Appeal Filing Information and Docket Sheet to US Court of Appeals re [87] Notice of Appeal. (ys, COURT STAFF) (Filed on 9/2/2005) (Entered: 09/02/2005)

09/02/2005	Copy of Notice of Appeal and Docket sheet mailed to all counsel. (ys, COURT STAFF) (Filed on 9/2/2005) (Entered: 09/02/2005)

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HOLLYNN DELIL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL Plaintiff, v. POINT REYES SEASHORE LODGE; JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN; and DOES 1-25, Inclusive, Defendants. /	CASE NO. C 03 0010 SI EMC *Civil Rights* **CERTIFICATION THAT SETTLEMENT OF ALL ASPECTS OF THE LAWSUIT HAVE NOT OCCURRED** (Filed Jun. 03, 2004)

I, Sidney J. Cohen, declare and certify as follows:

1. I am lead counsel for plaintiff Hollynn Delil in this action.

2. I certify that a settlement of all aspects of this lawsuit have not occurred.

3. I request that the March 23, 2004 "ORDER OF DISMISSAL UPON SETTLEMENT" be vacated and that the case forthwith be restored to the calendar for further proceedings.

I declare under penalty of perjury that the foregoing is true and correct, and that this Certification was executed this 3rd day of June, 2004.

/s/ Sidney J. Cohen
Sidney J. Cohen
Attorney for Plaintiff
Hollynn Delil

[Proof Of Service Omitted In Printing]

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(3)

No. 07-1181

FILED
MAY 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

POINT REYES SEASHORE LODGE, *et al.*,

Petitioners,

v.

HOLLYNN DELIL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is a compelling reason to grant the Petition where the District Court's unpublished August 9, 2005 "Order Awarding Attorneys' Fees And Costs" and the Ninth Circuit's November 16, 2007 2 page unpublished and non precedent setting Memorandum Opinion do not conflict with opinions of other Courts Of Appeal and do not raise new or important issues for this Court to decide.

2. Whether there is a compelling reason to grant the Petition where the District Court in its *March 24, 2004* Conditional "Order Of Dismissal Upon [Partial] Settlement"retained jurisdiction to vacate the Dismissal Order and to restore the case to the calendar if either party certified within 90 days that settlement had not occurred, where Respondent so certified, and where the Conditional Dismissal Order was vacated and the case restored to the calendar.

3. Whether there is a compelling reason to grant the Petition where the District Court's *March 24, 2004* Conditional "Order Of Dismissal Upon [Partial] Settlement" was not an appealable Order under Federal Rule Of Civil Procedure 54(a) and case law and where, consequently, Federal Rule Of Civil Procedure 54(d)(2)(b) did not require that Respondent file a motion for attorneys' fees.

4. Whether there is a compelling reason to grant the Petition where Petitioner did not assert at any time during the District Court proceedings that the *March 24, 2004* Conditional Dismissal Order required Respondent to file a motion for attorneys' fees.

5. Whether there is a compelling reason to grant the Petition where the parties' and District Court's *July 19, 2004* "Stipulation And Order For Dismissal Of The Injunctive Relief And Damages Aspects Of The Lawsuit" was not an appealable Order under Federal Rule Of Civil Procedure 54(a) and case law and where, consequently, Federal Rule Of Civil Procedure 54(d)(2)(b) did not require that Respondent file a motion for attorneys' fees within 14 days.

6. Whether there is a compelling reason to grant the Petition where, under Federal Rule Of Civil Procedure 54(d)(2)(b) and Northern District Civil Local Rule 54-6, the District Court "otherwise provided" that Respondent was not required to file a motion for attorneys' fees within 14 days from the *July 19, 2004* Stipulation and Order For Dismissal.

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INTRODUCTION

Respondent Hollynn Delil is a person with a disability who requires the use of a wheelchair for mobility.

The underlying civil rights lawsuit which is the subject of Point Reyes Seashore Lodge's Petition involves Ms. Delil's ultimately successful four (4) year odyssey as a "private attorney general" to require that Point Reyes make their upscale California Resort Lodge accessible to persons with disabilities and to recover both the damages she suffered and reasonable statutory attorneys' fees, litigations expenses, and costs. (R 02)

After 30 months of litigation the parties finally were able to settle the injunctive relief and damages aspects of the lawsuit, but not the attorneys' fees aspect, by a Court enforceable "Mutual Release And Settlement Agreement For Injunctive Relief and Damages." Shortly thereafter, the parties submitted to the District Court a "Stipulation And Order For Dismissal Of The Injunctive Relief And Damages Aspects Of The Lawsuit"which also incorporated the court enforceable Mutual Release and Settlement Agreement. The District Court promptly signed the Order in the Stipulated Dismissal as submitted, and it was filed on July 19, 2004.

The parties thereafter were not able to settle the attorneys' fee aspect of the case by negotiation, and consequently Ms. Delil made an attorneys' fee motion to the District Court, which it granted and which the Ninth Circuit affirmed.

Point Reyes argued in the *District Court* that Ms. Delil's attorneys' fee motion was not timely because not filed within 14 days from the *July 19, 2004* Stipulated Dismissal Order .

The District Court rejected Point Reyes' argument.

Point Reyes argued for the *first time* in its appeal to the Ninth Court that a prior, *March 24, 2004* District Court unilateral *Conditiona*l Dismissal was the operative Order governing the time for Ms. Delil to file her motion for attorneys' fees and that Ms. Delil was not entitled to her attorneys' fees because she did not file her motion for fees within 14 days of the March 24, 2004 Conditional Dismissal.

In an unpublished and non precedent setting two (2) page opinion, the Ninth Circuit rejected Point Reyes' arguments and affirmed the District Court's fee award to Ms. Delil.

No matter which Dismissal Order Point Reyes argues, Ms. Delil was not required to file her attorneys' fee motion within fourteen 14 days from either, and consequently there is no compelling reason for this Court to grant Point Reyes' Petition.

Ms. Delil was not required to file a motion for attorneys' fees within 14 days from the District Court's *March 24, 2004 conditional* dismissal order for several *alternative* reasons:

First, the District Court *retained jurisdiction* in the *March 24, 2004* conditional dismissal order for a 90 day period by reason of the following provision in the order:

> ". . . if any party certifies to this court . . . within ninety days from the date hereof that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings." (Pet. App. 16; *see also, e.g, Hagestead v. Tragesser*, 29 F.3d 1430, FN1 and FN4 (9th Cir. 1995); *Muze, Inc. v. Digital on Demand, Inc.*, 356 F.3d 492, 494 (2d Cir. 2004); *Shaffer v. GTE North, Inc.*, 284 F.3d 500, 503-504 (3d Cir. 2002))

Because Ms. Delil did so certify within 90 days, the order was vacated and the cause was restored to the calendar. Consequently, Ms. Delil was not required to file a motion for attorneys' fees.

Second, Fed. Rule Civ. Proc. 54(d)(2)(B) states in relevant part that "Unless otherwise provided by statute or order of the court, the motion [for attorney fees] must be filed no later than 14 days after entry of judgment. Fed. Rule Civ. Proc. 54(a) in turn defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**" (Emphasis added) In this regard, a conditional dismissal order only becomes final and appealable upon the occurrence of the specified event, in this case the passage of 90 days *without* a certification by either Point Reyes or Ms. Delil that settlement had not occurred. (*see, e.g., Barker v. Craig*, 127 U.S. 213, 215-216, 8 S. Ct. 1175 (1888); *Zucker v. Maxicare Health Plans, Inc.*, 14 F.3d 477, 481-482 (9th Cir. 1994). Because Ms. Delil

in this case certified within 90 days that settlement had not occurred, the conditional dismissal order did not become a final, appealable order. Consequently Ms. Delil was not required to file a fee motion.

Third, by never raising the *March 24, 2004* dismissal order issue in the District Court, Point Reyes waived the issue of whether the March 24, 2004 conditional Dismissal Order governs Ms. Delil's right to attorneys' fees. (*See. e.g., Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868 (1976) and *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882-883 (9th Cir. 2003)

Ms. Delil was not required to file her motion for attorneys' fees within 14 days from the *July 19, 2004* "Stipulation And Order For Dismissal Of The Injunctive Relief And Damages Aspect Of The Lawsuit" and its incorporated, court enforceable settlement agreement for several *alternative* reasons:

First, Fed. Rule Civ. Proc. 54(d)(2)(B)states in relevant part that "Unless otherwise provided by statute or order of the court, the motion [for attorney fees] must be filed no later than 14 days after entry of judgment. Fed. Rule Civ. Proc. 54(a) in turn defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**" (Emphasis added) In this regard, a Stipulation And Order For Dismissal is not an Order from which an appeal lies. (*See, e.g, Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986)–no appeal from judgment entered pursuant to stipulation; and *Slaven v. American Trading Transp. Co., Inc.*, 146 F.3d 1066, 1070 (9th Cir. 1998)—a party cannot appeal

the approval of a settlement to which it stipulated and did not reserve the right to appeal. Because the July 19, 2004 Stipulated Dismissal Order in this case is not an appealable order, Ms. Delil was not required to file a motion for attorneys' fees within 14 days thereafter.

Second, Ms. Delil was not required to file her motion for attorneys' fees within 14 days from the *July 19, 2004* Stipulation And Order For Dismissal because the District Court "otherwise ordered" pursuant to Fed. Rules Civ. Proc. 54(d)(2)(B), which states in relevant part that "**Unless otherwise provided** by statute or **order of the court,** the motion [for attorney fees] must be filed no later than 14 days after entry of judgment. Fed. Rules Civ. Proc. 54(a) in turn defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**" (Emphasis added) In this regard, the July 19, 2004 Stipulation And Order For Dismissal and its incorporated court enforceable "Mutual Release And Settlement Agreement" vested the Court with jurisdiction to interpret and enforce the negotiation of, and timing for, any attorneys' fee motion, and the District Court held in its August, 2005 Order Granting Attorney's fees that it had "otherwise provided." (Pet. App. 20; Pet. App. 7-8)

Petitioner Point Reyes has not sustained its burden to provide compelling reasons for this Court to grant its Petition: neither the District Court's unpublished Order granting an award of attorneys' fees nor the Ninth Circuit's unpublished and non precedent setting 2 page memorandum opinion conflict, as Point Reyes erroneously argues, with federal procedural rules or with existing case law from other circuits. Unlike the

cases Point Reyes cites, in this case the District Court's *March 24, 2004* Conditional Dismissal Order did *retain jurisdiction* over the parties' partial settlement for a 90 day period, and the Dismissal Order was vacated and the case restored to the calendar when Ms. Delil certified within the 90 day period that settlement had not occurred. Unlike the cases Point Reyes cites, in this case the Court's July 19, 2004 Stipulation And Order "otherwise provided" under Fed. Rules Civ. Proc. 54(d)(2)(B). Unlike the "final and appealable" judgment cases Point Reyes cites, neither the March 24, 2004 Conditional Dismissal Order nor the July 19, 2004 Stipulation And Order For Dismissal in this case were "final and appealable", which is a condition precedent to the requirement of Fed. Rules Civ. Proc. 54(d)(2)(B) and 54(a) to file a fee motion within 14 days.

STATEMENT OF THE CASE

Ms. Delil's January, 2002 lawsuit in the District Court sought *injunctive relief* to require that Point Reyes make their upscale Lodge accessible to disabled persons, for *damages* for denial of her civil rights, and for reasonable *attorneys' fees*, litigation expenses, and costs. (R1; ER 02)

A. Salient Facts Relating To *Partial* Settlement Of The Injunctive Relief And Damages Aspects Of The Lawsuit

Subject to negotiation and agreement on the terms and provisions of a formal, written Settlement Agreement, at a court settlement conference on March 12, 2004 the parties reached a **partial** settlement of the

injunctive relief and damages aspects of the lawsuit only. (R36; ER343). As part of the settlement, the parties placed on the record that it was a court enforceable settlement agreement and that the District Court would retain jurisdiction.

B. The District Court's March 24, 2004 Conditional Dismissal Order

After the Magistrate Judge who presided at the settlement conference informed the court of a partial settlement, on March 24, 2004, the District Court filed an Order Of Dismissal of the Action, which stated in relevant part:

> "IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, that if any party hereto certifies to this court . . . within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings." (Pet. App.16; R37; ER14)

C. Salient Facts Relating To *Final* Settlement Of The Injunctive Relief And Damages Aspects Of The Lawsuit And To The Unsuccessful Attempt To Settle The Attorneys' Fees Aspect

During the four (4) months from March 13, 2004 to July 12, 2004 counsel for the parties engaged in substantial discussions and negotiations regarding

differences of opinion on numerous injunctive relief scope of work items that remained unresolved following the March 12, 2004 settlement conference, certain terms and provisions of the Settlement Agreement that had not been discussed at the March 12, 2004 settlement conference, and the Stipulation for Dismissal Of The Injunctive Relief And Damages Aspects Of The Lawsuit to be filed with the court. (R64; ER 60, 121-128).

With respect to the attorneys' fees aspect of the lawsuit, On *May 31, 2004* Ms. Delil's counsel and Point Reyes' counsel Michael Brown entered into a "Stipulation For Review And Return Of Plaintiff's Counsels' Time Sheets And Billing Statements"[1]. (R 44; ER 353-355). It states in part:

> "B. Although the parties were not able to settle the amount of attorneys' fees, litigation expenses, and costs to be paid to plaintiff, [at the March 12, 2004 Settlement Conference,] they wish to continue the negotiation process for this last remaining aspect of the lawsuit to be resolved." (R 44; ER353)

Four days later, On June 3, 2004 (shortly before the 90 day period in the March 24, 2004 Conditional Dismissal Order would have run), Ms. Delil's counsel

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1. Ms. Delil had previously entered into a similar Stipulation with Point Reyes prior counsel, Martin Orlick. However, Ms. Delil's counsel and Mr. Orlick did not engage in negotiations to resolve the attorneys' fees aspect of the lawsuit prior to the substitution of Mr. Brown for Mr. Orlick.

filed a "Certification That Settlement of All Aspects of the Lawsuit Have Not Occurred." (R 45 ER 15).[2]

On June 9, 2004 the Court reopened the case and scheduled a case management conference for July 2, 2004. (R46; ER17)

On June 17, 2004 Ms. Delil's counsel and Point Reye's counsel filed their "Updated Joint Case Management Conference Statement." (R 49; ER 18-19) It states in part:

> **"I. STATUS: INJUNCTIVE RELIEF AND DAMAGES ASPECT OF THE CASE**
>
> "The parties have resolved the injunctive relief and damages aspects of the lawsuit by Settlement Agreement and expect that they will e file a dismissal of these aspects of the lawsuit either prior to or shortly after the [July 2, 2004] Case Management Conference." (R 49; ER 19)
>
> **II. STATUS: DAMAGES AND ATTORNEYS' FEES, LITIGATION EXPENSES, AND COSTS**
>
> Plaintiff has made a written demand for her attorneys' fees and has provided plaintiff's counsels' billing statements and daily time

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2. At the time of the Certification, Point Reyes' counsel had not provided Ms. Delil's counsel with the Mutual Release And Settlement Agreement signed by all parties and by him.

> sheets to . . . defendants **recently** substituted in counsel, Michael E. Brown. The parties expect to discuss whether *the amount of attorneys' fees*, litigation expenses, and costs *can be resolved without the need for further involvement by the court. If the parties cannot reach agreement without further involvement, they expect to request that your Honor refer the matter to Judge Chen for a further settlement conference. If the parties cannot reach agreement at such a further settlement conference, plaintiff thereafter will make her motion to the court for attorneys' fees, litigation expenses, and costs.*" (Emphasis added; R 49; ER 19)[3]

On July 13, 2004 the parties filed their "Stipulation and Order [Proposed] For Dismissal of the Injunctive Relief and Damages Aspects of the Lawsuit" with the Court. (Pet. App. 17-20; R 54; ER 22-46). The Court signed the Stipulation and Order as presented, and it was filed on July 19, 2004. (Pet. App. 17-20; R 54 ER22-46). It both incorporates the parties' "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only" (R 54 ER 22-23) and states in part:

> *"The attorneys' fees . . . aspects of the lawsuit shall be resolved by negotiation or, if*

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3. Contrary to Point Reyes assertion that "The parties had been negotiating the issue of attorneys' fees since March 12, 2004 (Pet.@31), there were virtually no substantive negotiations on the amount of fees prior to July, 2004. In this regard, in its July 6, 2004 Order to Show Cause (R 52), the Court ordered Point Reyes to respond in writing to Ms. Delil's demand for fees. (ER 21; *See, also* R 80, ER 391-393).

unsuccessful, by subsequent motion to the Court"

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"*The Court shall retain jurisdiction to interpret and enforce the* "Mutual Release And *Settlement Agreement* For Injunctive Relief And Damages Only" . . . *and to render a decision on any motion made to the Court for attorneys' fees. . . .*" (Emphasis added; Pet. App. 20; R54; ER 24).

The Settlement Agreement *incorporated* into the July 19, 2004 Stipulation And Order states in part:

"U. The *attorneys' fees* . . . aspects of this Lawsuit . . . *are the subject of continuing negotiation* and litigation. . . . *If the parties are not able to resolve the amount of attorneys' fees . . . by negotiation, Plaintiff will make* a *motion to the Court for attorneys' fees*, litigation expenses, and costs." (Emphasis added; R 54 ER 34-35)

Because the Court administratively had "closed" the case, on August 12, 2004, Ms. Delil's counsel filed a "Certification That Settlement of All Aspects of the Lawsuit Have Not Occurred, Request to Re-open the Case, and Request for the Court to Follow up on its July 6, 2004 Order to Show Cause to Defendants." (R 56 ER 47-49). Ms. Delil's counsel certified ". . . that a

settlement of the attorneys' fees, litigation expenses, and costs aspects of this lawsuit have not occurred" (R56; ER47) and requested ". . . that the Court:

> A. Reopen and restore the case to the calendar.
>
> XXXX
>
> C. *Set a further Case Management Conference for the purpose of determining the future conduct of the remaining attorneys' fees, litigation expenses, and costs aspect of the lawsuit.* (Emphasis added R56; ER48-49)

On August 25, 2004 the District Court issued its "ORDER" in response to the request, stating in part that ". . . *the Court orders that if plaintiff seeks to be* awarded fees and costs, she may apply for same by a regularly scheduled motion, *which the Court will hear and decide.*" (Pet. App. 21-22; R57; ER50; Emphasis added)

The parties thereafter were not able to negotiate a resolution of the attorneys' fee aspect of the lawsuit, and Ms. Delil filed her Motion for attorneys' fees on November 23, 2004. (R 59, 60, 61, 62, 69, 70, 71, 83, and 85).

D. The Parties' Positions At The District Court On The Issue Of The Timeliness Of Ms. Delil's Motion

In their opposition to Ms. Delil's Motion, Point Reyes argued that the Motion was not timely filed ". . . as required by Federal Rule Of Civil Proc. 54(d) and Civil Rule 54-6. . . ." on grounds that Ms. Delil ". . . was required to file her motion within 14 days after the entry of the *July 19, 2004*" Order of Dismissal or, in the alternative, "no later than 14 days after the entry of the Order of *August 25, 2004.*" (Emphasis added; R 73 ER 150-151)

Point Reyes did *not* raise the District Court's March 24, 2004 Conditional Dismissal at any time at the District Court level.

In her Reply to Point Reyes' opposition, Ms. Delil argued she was not required to file her attorneys' fee motion within 14 days of the July 19, 2004 dismissal on alternative grounds, as follows:

1. The July 19, 2004 Stipulation and Order for Dismissal of the Injunctive Relief and Damages Aspects of the Lawsuit Was Not an Order from Which an Appeal Lies. (R 79 ER284-285)

2. Pursuant to statutory authority, the Court "Otherwise Ordered." (R 79 ER 374-375)

3. The Parties' Settlement Agreement and Stipulation and Order for Dismissal

Vested the Court with Jurisdiction to Interpret and Enforce the Negotiation Of, and Timing For, Any Attorneys' Fees Motion. (R 79 ER 376-377)

4. Pursuant to Fed. Rules Civ. Proc. 60(b) (1)-(6), the Court may relieve Ms. Delil from any Order that may have started the running of the 14 day time period (R79 ER 376, fn.4).

In addition, at the April 8, 2005 hearing on her Motion, Ms. Delil advised the Court that ". . . while we believe that the motion was timely filed, . . . if for some reason you don't think it was and rule otherwise, we would be intending to file a Rule 6(b) and/or a 60(b) motion. In response, the Court stated that "I am not going to deny it on the basis of timeliness." (Transcript of Hearing on 4/8/05 at ER 320)

E. The District Court's Order Awarding Attorney Fees To Ms. Delil

In its August 8, 2005 "Order Awarding Attorney's Fees And Costs" of $168,879 (R 86 ER 307-314), the Court rejected Point Reyes position that Ms. Delil was required to file her attorneys' fee motion within 14 days from July 19, 2004:

"Defendants presented a thorough, painstaking and often contentious defense, which required the parties to engage in multiple mediations and other settlement negotiations and substantially extended the

time required to complete the case. (Pet. App. 12; R86; ER312)

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"Even if Rule 54 applies to the circumstances of this case, the Court finds that plaintiff's motion was timely. The rule provides that the motion for fees must be filed within 14 days of entry of judgment, "unless otherwise provided by statute or order of the court." The Court's Order of July 19, 2004 stated that it would retain jurisdiction over rendering a decision on any fees motion. The Order also stated that the parties were to resolve the fees issue by negotiation if possible. Finally, the Court's August 25, 2004 Order stated that plaintiff could seek fees and costs through a regularly scheduled motion.

The Court finds that the August 25, 2004 Order provided that plaintiff was not required to file her motion for attorneys fees and costs within 14 days of the stipulated dismissal, given that the Order was issued more than one month after the dismissal order." (Pet. App. 7-8; R 86 ER 309)

F. Point Reyes' Appeal To The Ninth Circuit

1. The March 24, 2004 Conditional Dismissal

Point Reyes devoted virtually *all* of its appellate brief in the Ninth Circuit to the proposition, *for the first time*, that Ms. Delil's right to an award of attorneys' fees is governed by the District Court's unilateral *March 24, 2004* conditional dismissal order. (Point Reyes opening brief @ pages 2-3 [Issues Presented] and 16-30 [Argument]).

In its unpublished and non precedent setting 2 page Memorandum opinion affirming the District Court's award, the Ninth Circuit determined that the *March 24, 2004 Dismissal Order* was *conditional* and that "When Delil certified that not all aspects of the case had settled, the Order was automatically vacated and the case reopened. (Pet. App. 2).

The Ninth Circuit also found that Point Reyes reliance on *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), and *Hagestaad v. Tragesar*, 49 F.3d 1430, was misplaced : *Kokkonen* did *not* involve a conditional order and has no application to this case, and in *Hagestaad* the condition for vacating the dismissal was never met because the 90 day deadline had passed. (Pet. App. 2-3)

2. The July 24, 2004 Stipulation And Order For Dismissal

In its unpublished and non precedent setting 2 page Memorandum Opinion affirming the District Court's award, the Ninth Circuit determined that the *July 24, 2004 Stipulation And Order* did not require that Ms. Delil file a motion by August 2, 2004 because the parties' agreement in the Stipulation And Order left the matter of attorneys' fees for resolution by negotiation or subsequent motion to the Court and because the Court's order retained jurisdiction to interpret and to enforce the terms of the settlement agreement and to render a decision on any motion made to the Court for attorneys' fees. Thus, the Court found it ". . . disingenuous for the Lodge to contend that Delil had a duty to file a separate and superfluous motion for fees by August 2, 2004."[4]

REASONS FOR DENYING THE PETITION

Point Reyes has not sustained its burden of providing a compelling reason for this Court to grant its Petition: neither the District Court Order granting an award of attorneys' fees nor the Ninth Circuit Court's unpublished and non precedent setting 2 page memorandum opinion conflict, as Point Reyes erroneously argues, with federal procedural rules or with existing case law from other circuits.

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4. Such a separate fee motion within this time frame would have been superfluous because 1) it would not have had to be made if the parties were able to negotiate a settlement of the attorney fee issue and because 2) it would have to be redone or amended following any unsuccessful negotiation.

Unlike the cases Point Reyes cites, in this case the District Court's *March 24, 2004* Conditional Dismissal Order did *retain jurisdiction* over the parties' partial settlement for a 90 day period, and the Dismissal Order was vacated and the case restored to the calendar when Ms. Delil certified within the 90 day period that settlement had not occurred.

Unlike the cases Point Reyes cites, by its conduct and by not asserting in the District Court proceeding in this case that the *March 24, 2004* Conditional Dismissal Order required that Ms. Delil file a motion for attorneys' fees, Point Reyes has waived the right to assert the issue on appeal.

Unlike the cases Point Reyes cites, the *March 24, 2004* Conditional Dismissal Order in this case was not a final and appealable order, which is a condition precedent to the requirement of Fed. Rules Civ. Proc. 54(d)(2)(B) and 54(a) to file a fee motion within 14 days.

Unlike the cases Point Reyes cites, in this case the Court's *July 19, 2004* Stipulation And Order "otherwise provided" in accord with Fed. Rules Civ. Proc. 54(d)(2)(B) and Local Rule 54-6.

Unlike the cases Point Reyes cites, the *July 19, 2004* Stipulated Dismissal Order in this case was not a final and appealable order, which is a condition precedent to the requirement of Fed. Rules Civ. Proc. 54(d)(2)(B) and 54(a) to file a fee motion within 14 days.

I. Point Reyes Has Not Provided A Compelling Reason To Grant The Petition Because Ms. Delil Was Not Required To File A Motion For Attorneys' Fees From The District Court's *March 24, 2004* Unilateral And Conditional Dismissal Order

A. Ms. Delil Was Not Required To File A Motion For Attorneys' Fees Because The District Court Retained Jurisdiction In The March 24, 2004 Conditional Dismissal Order To Vacate The Order And Restore The Case To The Calendar If, As Ms. Delil Did, A Party Certified Within 90 Days That Settlement Had Not In Fact Occurred

A District Court may retain jurisdiction to set aside or vacate a Conditional Dismissal Order. (*see, e.g., Hagestead v. Tragesser*, 29 F.3d 1430, FN4 (9th Cir. 1995) In *Hagestaad*, the district court unilaterally dismissed the case upon being advised of a settlement with the condition it would be set aside for good cause shown if the settlement was not consummated within 90 days. In *Hagestead* the Ninth Circuit determined that the Court had retained jurisdiction over the 90 day reservation to set aside the dismissal if the settlement was not consummated (@ FN1 and FN4). (*See also, Muze, Inc. v. Digital on Demand, Inc., supra,* and *Shaffer v. GTE North, Inc., supra,* each discussing conditional dismissals in which the court *retained jurisdiction* to reinstate the case).

Here, the District Court's Dismissal Order likewise retained jurisdiction by stating in the Order that it ". . . shall be vacated and this cause . . . restored to the calendar for further proceedings" if any party certifies to the court within 90 days that the settlement has not

occurred. Ms. Delil having so certified, the Order was vacated and the case restored to the calendar.

Not only is Point Reyes' position that the District Court's March 24, 2004 conditional dismissal was a final order which terminated the litigation and divested the court of jurisdiction at odds with the District Court's conditional dismissal order itself retaining jurisdiction, it also is at odds with Point Reyes' conduct during the entire District Court proceedings during the 17 months from the March 24, 2004 dismissal order through the August 9, 2005 District Court decision on Ms. Delil's motion for attorneys' fees.

- On *May 31, 2004*, more than two months after the March 24, 2004 Conditional Dismissal Order, Ms. Delil's counsel and defendant Point Reyes Seashore Lodge's counsel, Michael Brown, entered into a Stipulation for review of plaintiff's counsels time sheets as part of the agreed upon of process of attempting to negotiate and agreement on the amount of attorneys' fees to be paid by Point Reyes.

- On *June 17, 2004*, Ms. Delil's counsel and Point Reyes' counsel Mr. Brown advised the Court in their Joint Case Management Statement that they expected to discuss whether the amount of attorneys' fees could be resolved without further involvement by the Court; that they expected to ask the

Court to refer the matter of attorneys' fees to Judge Chen for a further settlement conference if they could not reach an agreement without further Court assistance; and that if they could not reach agreement at a further settlement conference that Ms. Delil *thereafter* would make her motion to the Court for attorneys' fees.

- The July 19, 2004 "Stipulation And Order For Dismissal of the Injunctive Relief And Damages Aspects Of The Lawsuit" filed with Court on *July 13, 2004*[5], which Order the Court signed unchanged, states that "The attorneys' fees, litigation expenses, and costs aspects of the lawsuit shall be resolved by negotiation or, if unsuccessful, by subsequent motion to the Court."

- Point Reyes did not assert in its opposition to Ms. Delil's attorney fee motion in the District Court that the March 24, 2004 Dismissal Order began the time running for Ms. Delil to file her fee motion.

Point Reyes' conduct leaves no doubt but that it did *not* consider that the *March 24, 2004* conditional

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5. Defendants' counsel Michael Brown did not sign and provide Ms. Delil's counsel the Stipulation And Proposed Order For Dismissal until July 12, 2004, and that is why neither it nor its incorporated Mutual Release And Settlement Agreement was filed with the District Court at an earlier date (R 54 ER 22-23)

dismissal order began the running of a time period for Ms. Delil to file a motion for attorneys' fees.

B. Point Reyes Has Waived the Right to Argue That the March 24, 2004 Conditional Dismissal Order Began The Time For Ms. Delil To File a Motion for Attorney Fees

Federal appellate courts generally will not consider an issue that was not raised or passed upon at the district court level (*Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868 (1976); *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882-883 (9th Cir 2003). The basic reason for the appellate court's unwillingness to consider an issue for the first time on appeal is ". . . to ensure that legal arguments are considered with the benefit of a fully developed factual record, offer appellate courts the benefit of the district court's prior analysis, and prevent parties from sandbagging their opponents with new arguments on appeal." (*Dream Palace v. County Of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004)

While it does not appear that there is a hard and fast rule to determine whether a matter has been properly raised in the district court, "A workable standard . . . is that the argument must be raised sufficiently for the trial court to rule on it." (*Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992)

Because Point Reyes never took the position at the district court level that the March 24, 2004 conditional dismissal order began the time running for Ms. Delil to file a fee motion, it has waived the right to make the argument to this Court.

C. Ms. Delil Was Not Required To File A Motion For Attorneys' Fees Because The Conditional Dismissal Was Not A Final And Appealable Order

Fed. Rules Civ. Proc. 54(d)(2)(B) states in relevant part that "Unless otherwise provided by statute or order of the court, the motion [for attorney fees] must be filed no later than 14 days after entry of **judgment.**" Fed. Rules Civ. Proc. 54(a) in turn defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**" (Emphasis added) A dismissal order that is **conditioned** on the occurrence or nonoccurrence of a future event becomes final and appealable only upon occurrence or nonoccurrence of the specified event (*Barker v. Craig*, 127 U.S. 213, 215-216, 8 S. Ct. 1175 (1888); *Zucker v. Maxicare Health Plans, Inc.*, 14 F.3d 477, 481-482 (9th Cir. 1994).

Here, the District Court's unilateral March 24, 2004 dismissal order was a **conditional** dismissal order. This conditional dismissal stated that ". . . if any party hereto certifies to this court . . . within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings."(Pet. App. 16; R37; ER 14)

Ms. Delil's counsel certified prior to the expiration of the ninety day period that settlement of all aspects of the case had not occurred (R 64; ER60, 121-128; R45);

ER15).[6] Prior to the expiration of the ninety day period, on June 9, 2004, the March 24, 2004 conditional Dismissal Order was vacated by the reopening of the case and scheduling a case management conference for July 2, 2004 (R46; ER 15; page 16.)

Because the March 24, 2004 Conditional Dismissal Order never became a final, appealable order, Ms. Delil was not required to bring a motion for attorneys' from the March 24, 2004 Conditional Dismissal Order.

D. Point Reyes' Cited Statutes And Cases with Respect to the March 24, 2004 Conditional Dismissal Order Are Either Inapplicable or Distinguishable

Citing numerous statutes and cases, Point Reyes' *erroneously* argues that *every* dismissal with prejudice is a final and appealable order that terminates the litigation and divests the court of jurisdiction (Pet. @ 22-23, citing *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590 (8th Cir. 1968), dismissal based on pleading failing to state a cause of action; *Schwarz v. Folloder*, 767 F.2d 125 (5th Cir. 1985), dismissal at plaintiff's request pursuant to 41(a)(2); *Flood v. Harrington*, 532 F.2d 1248 (9th Cir. 1976), dismissal for summary judgment; and *Krull v. Celotex*, 827 F.2d 80 (7th Cir. 1987), dismissal for summary judgment).

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6. *See, e.g., Hagestead v. Tragesser*, 29 F3d 1430 (9th Cir. 1995) for a case with a similar conditional dismissal order with a 90 day set aside time frame which, unlike here, became final after 90 days because the condition which would have prevented finality within the prescribed time frame did not occcur.

None of Point Reyes cited cases deal as here, with a conditional dismissal order in which the Court retained jurisdiction to vacate the dismissal order and restore the case to the calendar, and none of the Point Reyes' cited cases deal, as here, with a conditional dismissal whose finality, by it terms, is dependent on the occurrence or non occurrence of a condition (*See* I A and C, *supra.*)

Citing *Weldon v. United States*, 196 F.2d 874, 875-876 (9th Cir. 1952), *Calhoun v. United States*, 647 F.2d 6 (9th Cir. 1981), and *Bailey v. Potter*, 478 F.3d 409, 412 (D.C. Cir. 2007), Pt. Reyes *erroneously* argues, *for the first time to this Court*, that the March 24, 2004 dismissal order complied with the requirements of *Fed. R. Civ. Proc. 58(a)* and consequently was a "final order" when entered on the docket under Fed. R. Civ. Proc. 79(a). (Pet. @23, 26-27) However, *Weldon*, *Calhoun*, and *Bailey* only deal with whether an appeal was taken from an order which met the requirements of Fed. R. Civ. Proc. 58(a)and 79(a): those cases do not hold that every order that complies with Fed. R. Civ. Proc. 58(a)and 79(a) is final and appealable or that the court lacks the power to retain jurisdiction to vacate the order if a condition specified in the order does, or does not, occur.

Moreover, in determining whether a dismissal order is final and appealable or whether it terminates the litigation and divests the court of jurisdiction, it is important to ascertain the District Court's intent. A dismissal order is final and appealable only if it is a full adjudication of the issues and clearly evidences the judge's intention that it be the court's final act in the matter (*National Distrib. Agency v Nationwide Mur.*

Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997). A District Court's dismissal order is not a final, appealable order unless the circumstances clearly indicate that the court intended to terminate the litigation. (*Knevelbaard Dairies v. Kraft Foods*, 232 F.3d 979, 983 (9th Cir. 2000). In evaluating the District Court's intent, "We [the appellate court] look beyond the dismissal order and read the entire record, including the District Court's action subsequent to filing of the order, to determine what effect the court intended its order to have." (*Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 870 (9th Cir. 2004); *Montes v. United States*, 37 F.3d 20, 22 (9th Cir. 1996)). Here, a record review reveals that the Court's intent, as stated in the dismissal order itself and confirmed by the Court's subsequent conduct, was for the March 24, 2008 Order to be vacated and the cause restored to the calendar if either party, as here occurred, certified within 90 days that settlement had not occurred and for the order to be final and appealable only if 90 days passed without a certification such as Ms. Delil made.

Citing *Keeling v. Sheet Metal Workers International Assn.*, 937 F.2d 408 (9th Cir. 1991), Point Reyes *erroneously* argues that the March 24, 2004 conditional dismissal "... was merely placing all parties on notice ... that the Court would consider the failure to consummate the settlement within 90 days "good cause" to vacate the dismissal pursuant to a motion filed in accordance with Fed. R. Civ. Proc. 60(b) ..."(Pet. @24). There is nothing in *Keeling*, a case in which the Sheet Metal Union made a Rule 60(b)(6) motion, that provides "notice" or otherwise suggests that a party such as Ms. Delil must make a Rule 60 (b)(6) motion rather than

follow the specific instructions in the conditional dismissal order within 90 days to have the order vacated and the case to restored the active calendar. To the contrary, the March 24, 2004 dismissal order unequivocally states that upon happening of the condition the ". . . order shall be vacated ." Moreover, Fed. R. Civ. Proc. 60(b) applies only to final judgments or orders, which the March 24, 2004 conditional order was not.[7] Consequently, Ms. Delil not only was not on "notice" to make a Fed. R. Civ. Proc. 60(b) motion, she was precluded from doing so. Even if one were to construe the March 24, 2004 dismissal as a final, appealable order, the "shall be vacated" and "restored to the calendar" language upon the certification that settlement has not occurred, together with restoring the case to the calendar upon the certification, is sufficient to comply with Fed. Rule Civ. Proc. 58(a) and 79(a).

II. Point Reyes Has Not Provided A Compelling Reason To Grant The Petition Because Ms. Delil Was Not Required To File A Motion For Attorneys' Fees Within 14 Days From The *July 19, 2004* Stipulated Dismissal Order

A. The *July 19, 2004* Stipulated Dismissal Order Is Not An Order From Which An Appeal Lies

Fed. Rule Civ. Proc. 54(d)(2)(B) states in relevant part that "Unless otherwise provided by statute or

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7. Point Reyes also argues that *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-255 (1988) supports its position that the March 24, 2004 dismissal cannot be vacated because it is contrary to the application and construction of Fed. R. Civ. Proc. 60(b).(Pet.@ 27) *Bank Of Nova Scotia* has nothing to do with Fed. R. Civ. Proc. 60(b) or the issues in this case.

order of the court, the motion [for attorney fees] must be filed no later than 14 days after entry of **judgment.**[8] Fed. Rules Civ. Proc. 54(a) defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**"

Here, the July 19, 2004 "Stipulation And Order For Dismissal Of The Injunctive Relief And Damages Aspects Of The Lawsuit" does not fall within the "Judgment" definition of an "order from which an appeal lies." Neither Ms. Delil nor Point Reyes could take an appeal from their Stipulation and Order and the Settlement Agreement incorporated by reference in the Stipulation as if set forth in full (*see, e.g., Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986)–no appeal from judgment entered pursuant to stipulation; *Slaven v. American Trading Transp. Co., Inc.*, 146 F.3d 1066, 1070 (9th Cir. 1998)—a party cannot appeal the approval of a settlement to which it stipulated and did not reserve the right to appeal; and *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994)–unequivocal agreement with trial court's procedure precluded objection on appeal).

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8. Local Civil Rule 54-6 likewise provides for the 14 day period after entry of judgment. The reason for the 14 day requirement is because the losing party has only 30 days to file a notice of appeal, and an attorneys' fees motion may influence the decision of the losing party as to whether it wishes to appeal the judgment. Here, Point Reyes knew the amount of attorneys' fees that Ms. Delil was seeking at the time of the July 19, 2004 Stipulated Dismissal Order and knew that Ms. Delil would file a fee motion if the parties could not otherwise agree on an amount through the negotiation process or through mediaiton.

Here, the July 19, 2004 Stipulated Dismissal Order and incorporated Settlement Agreement recite precisely what injunctive relief work has to be performed and exactly the amount of damages that has to be paid (R 54 ER 26-30). Moreover, the incorporated settlement agreement provides that "The attorneys' fees . . . are the subject of continuing negotiation . . . in the lawsuit . . ." and that "If the parties are not able to resolve the amount of attorneys' fees by negotiation, . . . Plaintiff will make a motion to the court for attorneys' fees." The parties having so agreed in their settlement agreement, the parties have so stipulated, and the Court having so Ordered, there simply is nothing that Point Reyes could appeal. Consequently, the 14 day time period to file a motion for attorneys' fees did not begin to run.

B. The July 19, 2004 Stipulated Dismissal Order "Otherwise Provides"

Fed. Rules Civ. Proc. 54(d)(2)(B) states in relevant part that "**Unless otherwise provided by . . . order of the court**, the motion [for attorney fees] must be filed no later than 14 days after entry of judgment." (Emphasis added)

Here, the District Court in its July 19, 2004 Order of Dismissal "otherwise provided by Order." It states in part:

> "The attorneys' fees, litigation expenses, and costs aspects of the lawsuit shall be resolved by negotiation or, if unsuccessful, by subsequent motion to the Court.

> The Court shall retain jurisdiction to interpret and to enforce the terms of the "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only' incorporated by reference herein and to render a decision on any motion made to the Court for attorneys' fees, litigation expenses, and costs."[9]

The District Court's subsequent August 25, 2004 Order and August 8, 2005 Order awarding attorneys' fees confirms that the Court did "otherwise order." (Statement Of The Case, C, D, and E, supra) Consequently Ms. Delil was not required to file a fee motion within 14 days from the July 19, 2004 Stipulated Dismissal Order.[10]

C. Point Reyes' Cited Statutes And Cases with Respect to the July 19, 2004 Stipulated Dismissal Order Are Either Inapplicable or Distinguishable

Point Reyes *erroneously* argues that the District Court decision in this case is contrary to the 14 day time

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9. This language was in the Order provided to the Court by the parties and was adopted by the Court without change.

10. Nor would Ms. Delil have only 14 days from August 25, 2004 to file her motion. The August 25, 2004 Order is not subject to the 14 day time requirement of Fed. Rules Civ. Proc. 54(d) for the same reasons that the July 19, 2004 Order is not so subject: because it is an order in which the Court "provided otherwise" and because it is not an Order from which an appeal can be taken.

period decisions in *Bender v. Freed*, 436 F.3d 747 (7th Cir. 2006), *IPXL Holdings, LLC v. Amazon.Com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005) and *Tancredi v. Metropolitan Life Ins. Co.*, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003) (Pet. @ 30, 34, 36, and 37, footnote 11, 38, and 39).

First, the 14 day time period began to run in the summary judgment cases of *Bender* and *IPXL* and the dismissal for failure to state a claim case of *Tancredi* because they *were* final judgments and orders from which an appeal lies. In this Stipulated Dismissal Order case, the July 19, 2004 Dismissal Order is *not* a final Order from which an appeal lies and consequently did not begin the 14 day time period. (IIA, *supra*)

Second, the 14 day time period did not begin to run in this case because, unlike *Bender*, *IXPL*, and *Tancredi*, the July 19, 2004 Stipulated Dismissal Order in this case "otherwise provided." (II B, *supra*).

Point Reyes also *erroneously* argues that Ms. Delil did not fulfill her "duty" to comply with Local Rule 54-6, which states that "Unless otherwise ordered by the Court after a stipulation to enlarge time under Civil L.R. 6-2 . . . , motions for awards of attorneys' fees by the Court must be served and filed within 14 days after judgment. . . ." (Pet. @35-36)

First, the July 2004 Stipulated Dismissal Order is not a final Order from which an appeal lies and consequently Civil Local Rule 54-6 does not apply and its 14 day time period did not begin to run. (IIA, *supra*)

Second, assuming arguendo that Civil Local Rule 56-4 does apply, the District Court held that it had "otherwise ordered" in the parties' Stipulated Dismissal Order which the District Court signed (IIB, supra.) Moreover, with respect to the fact that a declaration prescribed under Local Rule 6-2 did not accompany the July 19, 2004 Stipulation And Order, Fed. Rule Civ. Proc. 83 states in part:

Rule 83. Rules by District Courts; Judge's Directives

> (a)(2) A local rule imposing a requirement of *form* shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." (Emphasis added).

Here, local rule 6-2(a) upon which Point Reyes relies is entitled **form** and content and is subject to Fed. Rule Civ. Proc. 83, and any failure to file a declaration was merely one of **form** that was not willful.

CONCLUSION

Because the District Court's March 24, 2004 unilateral Conditional Dismissal was not a final, appealable order, and because the District Court retained jurisdiction to vacate the Order upon either parties' certification within 90 days that the settlement had not occurred, Ms. Delil was not required to file a motion for attorneys' fees. In any event, Point Reyes waived the issue of whether the March 24, 2004 Conditional Dismissal Order governs whether Ms. Delil

timely filed her motion for attorneys' fees both by its conduct and its failure to raise the issue at the District Court level.

Pursuant to the parties' July 19, 2004 Stipulated Dismissal Order and applicable law, Ms. Delil's was not required to file her attorneys' fee motion within 14 days 1) because the Stipulated Dismissal Order was not an order from which an appeal lies and 2) because the Stipulated Dismissal Order "otherwise provided."

Neither the District Court Order granting an award of attorneys' fees nor the Ninth Circuit's unpublished and non precedent setting 2 page memorandum opinion conflict with federal procedural rules or with case law from other circuits.

Because there is no compelling reason to grant it, Ms. Delil respectfully requests that the Court deny Point Reyes' Petition for Writ of Certiorari.

Respectfully submitted,

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No. 07-1181

FILED
MAY 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

POINT REYES SEASHORE LODGE;
JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN,

Petitioners,

v.

HOLLYNN DELIL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' BRIEF IN REPLY

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ARGUMENT

I. THE DISTRICT COURT WAS NOTIFIED BY THE PARTIES ON JUNE 17, 2004 THAT THE SETTLEMENT AGREEMENT HAD BEEN COMPLETELY EXECUTED; THEREFORE, THE MARCH 24, 2004 DISMISSAL WITH PREJUDICE BECAME THE FINAL ORDER OF THE COURT AND TERMINATED ITS SUBJECT MATTER JURISDICTION OVER THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT

The Court of Appeals and the Respondent have characterized the March 24, 2004 dismissal with prejudice (App16) as a *conditional* dismissal (App1-3). The Supreme Court since the adoption of the *Federal Rules of Civil Procedure* has never decided whether *Rule 41(b)* or any other federal rule authorizes the district court to grant a *conditional* dismissal with prejudice[1] nor has the Court held that any order can be automatically vacated without an order entered on the docket.

The use of a conditional dismissal and the practice by some district courts of clearing their dockets by dismissing an action subject to reinstatement was questioned by the Seventh Circuit in ***Otis v. City of***

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[1] *Rule 41(a)(2)*, however, specifically allows the district court to dismiss the complaint without prejudice with conditions upon application of the plaintiff after an answer has been filed by the defendant.

Chicago, 29 F.3d 1159 (7th Cir. 1994) because of the uncertainty such a dismissal interjects into the litigation and appellate process. The appellate court in ***Otis*** criticized the use of such a procedure because it has had the unintended effect of prolonging the litigation and fostering an ambiguous and confusing record. See, e.g., ***Ford v. Neese***, 119 F.3d 560, 572 (7th Cir. 1997); ***King v. Walters***, 190 F.3d 784, 786 (7th Cir. 1999); compare, ***Shaffer v. GTE North, Inc.***, 284 F.3d 500 (3rd Cir. 2002) [dicta questioning the concerns of the appellate court in ***Otis v. City of Chicago***]; ***Muze, Inc. v. Digital on Demand, Inc.***, 356 F.3d 492 (2nd Cir. 2004).

Moreover, such a practice appears to bypass the normal procedural requirements of a motion for an order to effect change in the status of the pending litigation (see *Fed.R.Civ.Proc., Rules 7, 60(b), 58, 79*). As suggested in the Petitioners' Petition, the Court is requested to clarify the procedural requirements for vacating an order entered on the docket dismissing an action with prejudice and for reinstating the previously dismissed action, as well as the procedure for vacating any other final order. Such a clarification is especially important when there is a factual conflict with regard to whether the condition for vacating a dismissal has been fulfilled or there is a possibility of further litigation if the dismissal or order is not the final act in disposing of a cause or issue.

The district court in the March 24, 2004 dismissal did not expressly retain jurisdiction over the enforcement of the settlement agreement (App16).

See ***Hagestad v. Tragesser***, 49 F.3d 1430 (9th Cir. 1995); ***O'Conner v. Colvin***, 70 F.3d 530 (9th Cir. 1995). If the March 24, 2004 dismissal was final when issued, or became a final order upon the happening of an event, i.e., the execution of a settlement agreement within 90 days, the district court lost subject matter jurisdiction to grant the Respondent her claim for statutory attorney's fees as the "prevailing party." ***Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources***, 532 U.S. 598 (2001); ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994); see also ***American Disability Association, Inc. v. Chmielarz***, 289 F.3d 1315 (11th Cir. 2002).

The Respondent in her Brief at page 3 continues to maintain that her act of certifying to the district court on June 3, 2004, that all aspects of the lawsuit (i.e., the claims raised by the pleadings) were not settled, was sufficient to restore the matter to the active trial calendar. This position is consistent with the holding in the memorandum of decision (App2). However, the appellate court in memorandum of decision and the Respondent incorrectly focused on the **act** of certification rather than the **condition** imposed for reinstating the action, which would have been the failure to execute a settlement agreement within 90 days.[2]

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[2] The billing records reflect that counsel was aware that the Respondent had signed the settlement agreement on April 30,

(Continued on following page)

The Respondent does not supply any rationale for the holding in the memorandum of decision that the March 24, 2004 dismissal (App16) was automatically vacated; and, she does not explain why the decision by the Ninth Circuit is not in conflict with the motion and docketing requirements of the *Federal Rules*, and why the memorandum of decision is factually and legally accurate. See *Fed.R.Civ.Proc., Rules 7, 60(b), 58 & 79.*

If the dismissal with prejudice was *conditional* and authorized by the *Federal Rules* or if the district court had the "jurisdiction pursuant to its inherent supervisory power" to issue a *conditional* dismissal with prejudice (App16), then the record on appeal clearly established that the condition imposed by the district court for vacating its dismissal had not been met. In order to arrive at the conclusion that the action was automatically vacated and restored to the calendar, the language used in the order dismissing the action must be ignored.

Respondent's claim for statutory attorney's fees is not a substantive claim for relief raised by the pleadings. Respondent's entitlement to an award of attorney's fees can only be had following the conclusion of the litigation and a finding by the district court as to who was the "prevailing party." 42 USC § 12205; ***White v. New Hampshire Dep't of Employment***

2004 and that as of May 13, 2004 he was in possession of the settlement agreement signed by the Petitioners on May 10, 2004 (ER Vol. 1, p. 125).

Security, 455 U.S. 445, 451-452 (1982). The Respondent attempts to avoid the decisions of the Supreme Court in ***White*** and ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196, 199-200 (1988) which specifically held that a claim for statutory attorney's fees " . . . 'raises legal issues collateral to' and 'separate from' the decision on the merits." ***Id.*** at 486 U.S. 200.

The complaint filed herein was for injunctive relief pursuant to 42 USC § 12188(a) and damages pursuant to various California statutes (ER1-13). The substantive claims raised by the complaint were all resolved at the mandatory settlement conference, and the settlement was memorialized pursuant to a written agreement executed by all the parties by May 10, 2004 (App18), within the ninety (90) days specified by the *conditional* dismissal (App16). Furthermore, the district court was notified of the settlement by parties in the Joint Case Management Statement on June 17, 2004 (App29, DE49; ER18-19) also prior to the expiration of 90 day deadline.[3]

As was noted previously, the decisions in ***Buckhannon*** and ***Kokkonen*** required that the Respondent obtain a judicially enforceable settlement agreement or a judgment in her favor **before the**

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[3] The June 17, 2004 (App29, DE49) Joint Case Management Statement prepared by the Respondent's counsel stated: "The parties have resolved the injunctive relief and damages aspects of the lawsuit by Settlement Agreement and expect they will e file a dismissal of these aspects of the lawsuit prior to or shortly after the Case Management Conference." (ER19).

district court could determine her status as the "prevailing party." See ***American Disability Association, Inc. v. Chmielarz***, 289 F.3d 1315 (11th Cir. 2002). Thus, the issue of attorney's fees was never part of the lawsuit before the district court **at the time of the certification.**

Consequently, if dismissal was conditioned upon the finalization of the settlement agreement, the dismissal became a "final order" on June 17, 2004 when the parties confirmed the condition had been fulfilled. (App29, DE49). The *June 17* notification superseded and corrected the factual representation in the certification filed on June 3, 2004 (App29, DE45) within the 90 period. Hence, there was no cause or litigation for the district court to reinstate after May 10, 2004.

It was the failure to consummate a settlement agreement within 90 days, and not the **act** of certification, which would cause the dismissal to be vacated and set aside.

To date the petitioners have not found any decision of the Court or a decision of any Court of Appeals holding that an action could be automatically vacated by the mere filing of a factually and legally inaccurate certification by a party's counsel as held by the Ninth Circuit in the memorandum of decision (App1-3) or as asserted by the Respondent.

The Respondent has not articulated any justification for the district court or the Ninth Circuit substituting the improvised procedure of certification with the attendant automatic vacation of the dismissal for the orderly procedures set forth in the *Federal Rules,* which requires the filing of a noticed motion that sets forth the basis for vacating the order and a subsequent entry of an order disposing of the motion (see *Fed.R.Civ.Proc., Rules 7, 60(b), 79*). Had the normal procedures authorized by the *Federal Rules* been utilized, the issue as to whether the action had been settled would have been squarely before the district court and could have been resolved like any other disputed fact.

The Respondent has alluded to the fact that the memorandum of decision in this case was not a published opinion and therefore cannot be cited as authority in any other case as a reason for denying the Petitioners' relief. The Court on numerous occasions has granted the writ of certiorari in a case involving an unpublished opinion where there was a need to clarify particular procedures or jurisdictional issues. See, e.g., ***Kokkonen v. Guardian Life Ins. of America***, 511 U.S. 375 (1994); ***Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources***, 532 U.S. 598

(2001).[4] Petitioners urge the Court to exercise its discretion and issue the writ in this matter.

II. THE SECOND ORDER FOR DISMISSAL ENTERED ON JULY 19, 2004 WAS THE FUNCTIONAL EQUIVALENT OF A CONSENT DECREE AND WAS A JUDGMENT AS DEFINED BY *RULE 54(a)*; CONSEQUENTLY, THE RESPONDENT WAS REQUIRED TO FILE HER MOTION FOR ATTORNEY'S FEES WITHIN 14 DAYS OF THE ENTRY OF THE ORDER PURSUANT TO *RULE 54(d)(2)(B)* OR *CIVIL LOCAL RULE 54-6*

The Respondent postulates that she was not required to comply with the timely filing requirements of either the *Federal Rules* or the *Civil Local Rules* in order to receive an award of statutory attorney's fees because of the novel assertion that the July 19, 2004 Order for Dismissal (App17-20) was not a "judgment" as defined by *Rule 54(a)*.[5]

A dismissal which includes a reservation of jurisdiction to enforce a settlement agreement or which incorporates the terms of the settlement agreement is a hybrid order which arose after the

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[4] Although not raised at the district court level, the jurisdictional issue was raised on appeal and decided by the Ninth Circuit in its memorandum of decision and is properly before this Court. See ***Shaffer v. GTE North, Inc.***, 284 F.3d 500, 502 (3rd Cir. 2002).

[5] See Brief in Opp. pp. 4-6, 18, 27-28.

decision of the Court in ***Kokkonen*** and ***Buckhannon***. Since the decisions in ***Kokkonen*** and ***Buckhannon***, the Court has not ruled upon the status of a dismissal as a judgment pursuant to *Rule 54(a)* where the district court retained jurisdiction to enforce a settlement agreement.

Rule 54(a) defines a judgment as follows: "'Judgment' as used in these rules includes a **decree** and any order from which an appeal lies."

The Eleventh Circuit in ***American Disability Association, Inc. v. Chmielarz***, 289 F.3d 1315 (11th Cir. 2002) addressed the interaction of the two Supreme Court opinions and reconciled the holding in each by coming to the conclusion that an order of the district court dismissing an action that either incorporates the terms of a settlement agreement or expressly retains jurisdiction to enforce the settlement agreement is the functional equivalent of a consent decree. ***Id.*** at 289 F.3d 1320. The court in ***Chmielarz*** further held that:

> The formal entry of a consent decree [is] wholly unnecessary and would not effect the status of the parties or the district court's power to enforce the terms of the settlement. Rather, by approving the terms of the settlement agreement and then expressly retaining jurisdiction to enforce its terms, the district court effected (sic) precisely the same results as would have been achieved pursuant to a consent decree. *Id.* at 289 F.3d 1321.

Petitioners maintain, pursuant to the holding in ***Chmielarz,*** that the hybrid dismissal order is the functional equivalent of a consent decree; and therefore, it is a judgment as defined by *Rule 54(a)*. See ***Kiwi Coders Corporation v. Acro Tool & Die Works***, 250 F.2d 562, 568 (7th Cir. 1957) [A consent decree is a judicial act [citation omitted] with the same force and character, therefore, as a judgment rendered following a contested trial].

The Petitioners' request that the Court issue the writ of certiorari and adopt the reasoning of the Eleventh Circuit in ***Chmielarz*** and hold that a dismissal which incorporates a settlement agreement or which expressly retains jurisdiction to enforce the terms of a settlement agreement is the functional equivalent of a consent decree and is a judgment as defined by *Rule 54(a)* which required the Respondent to file her fees motion within the 14 days specified by *Civil Local Rule 54-6*.

III. THE DISTRICT COURT DID NOT HAVE THE UNTRAMMELED DISCRETION TO EXTEND THE TIME FOR THE RESPONDENT TO FILE HER MOTION FOR FEES

The Respondent asserts that the following language of *Rule 54(d)(2)(B)*: "Unless otherwise provided by . . . order of the court . . . " grants to the district court the discretion to waive the 14 day deadline for the filing of her fees motion pursuant to *Civil Local Rule 54-6*. In this case there is no order of the district

court either setting a specific time or enlarging the time for the Respondent to file her motion for fees.

Pursuant to the *Civil Local Rule 54-6* the Respondent was required to file her fees motion by August 2, 2004. Both the district court (App7-8) and the Ninth Circuit (App3) held that it was not necessary for the Respondent to comply with the local rule. Neither court provided any case authority for their holdings and the district court's rationale is contrary to the holding in ***Tancredi v. Metropolitan Life Ins. Co.***, 378 F.3d 220 (2nd Cir. 2004), cert. denied, 539 U.S. 942 (2003).

The Second Circuit in ***Tancredi*** construed "order of the court" as used in *Rule 54(d)(2)(B)* as meaning only the local rules adopted by the entire district and not those of a particular district court judge.

After reviewing several appellate decisions from other circuits concerning the local rules which modified the 14 day deadline for filing a fees motion, the court in ***Tancredi*** concluded that:

> None of these cases, however, suggest that "order of the court" confers on district courts untrammeled discretion to extend the time to file a fee motion. Based upon the reasoning of these cases and the text of *Rule 54* itself, we are persuaded that reading "order of the court" to mean an individual judge's order extending the deadline . . . would threaten the concept of a uniform deadline – even at the district level – and fly in the face of the

rationale underlying the deadline. ***Id.*** at 378 F.3d 227.

In addition, the court in ***Tancredi*** held that *Rule 54(d)(2)(B)* had to be read together with *Rule 6(b)(2)* and " . . . absent a statute or order of the court such as a local rule, the district court was required to find 'excusable neglect' under *Rule 6(b)(2)* to extend the time to move for attorney's fees after the expiration of *Rule 54's* fourteen day deadline." ***Id.*** at 378 F.3d 227-228.

The Respondent has never explained why she did not file her fees motion within the deadline of the local rules or seek an enlargement of time. Moreover, neither the district court nor the appellate court provided any legal basis for the Respondent being excused from complying with the local rules. The Court is requested to address the conflict between the Second and the Ninth Circuits' interpretation of "order of the court" as used in *Rule 54(d)* and adopt the ***Tancredi*** court's interpretation limiting the discretion of the district court to avoid the local rules.

CONCLUSION

The record on appeal reflects a casual approach to the application of the *Federal Rules of Civil Procedure* and *Civil Local Rules* by the district court and the Ninth Circuit.

The logical conclusion to be drawn from the district court's order awarding attorney's fees and the memorandum of decision affirming the award is: the timely filing of a fees motion is superfluous (App3) and the district court judge has the discretion, without notice to the defendant, to waive the requirement for the plaintiff to follow the local rules for obtaining an enlargement of time and the time deadlines for the filing of a fees motion. Furthermore, if necessary, the district court can retroactively, and without notice to the defendant, grant an extension of time and waive the filing of a motion to enlarge time pursuant to *Rule 6(b)* or *60(b)* by the plaintiff (App7-8, 21-22).

The district courts have not heretofore been granted such untrammeled discretion to dispense with the compliance with the procedures authorized by the federal and local rules and to retroactively waive compliance with the local rules.

The Court is requested to issue the writ of certiorari in order to clarify the discretion of the district court to (1) conditionally dismiss an action with prejudice; (2) vacate a dismissal with prejudice without a hearing or the entry of a specific order vacating the dismissal on the docket; and (3) dispense with a party's compliance with the federal and local

procedural rules. The Court is further requested to reverse the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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